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No. 15,480

IN THE
United States Court of Appeals
For the Ninth Circuit

J. C. MILLETT Co., a corporation doing
business as Key Distributing Co.,
Appellant,

vs.

DISTILLERS DISTRIBUTING CORPORATION,
Appellee.

Appeal from the United States District Court for
the Northern District of California,
Southern Division.

BRIEF FOR APPELLEE.

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FILED

JUL 26 1957

PAUL P. O'BRYEN, CLERK

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BRIEF FOR APPELLEE.

I.

JURISDICTION.

This action was originally commenced by plaintiff-appellant by the filing of a complaint in the Superior Court of the State of California, in and for the City and County of San Francisco (R. 3-13). The action was removed to the United States District Court for the Northern District of California, Southern Division upon the petition of defendant-appellee, pursuant to the provisions of Title 28, United States Code, Section 1441 (a) (28 U.S.C.A. Section 1441 (a)). The United

States District Court had original jurisdiction of this action pursuant to the provisions of Title 28, United States Code, Section 1332 (a) (1) (28 U.S.C.A. Section 1332 (a) (1)), as the pleadings and the petition for removal disclosed that the matter in controversy exceeded the sum of \$3000.00 exclusive of interest and costs, and was between citizens of different states (R. 39).

After answer by the defendant (R. 13-27), trial was regularly had before the District Court sitting without jury (R. 50-157). On January 31, 1957, the District Court signed and filed its findings of fact, conclusions of law, and judgment in favor of defendant-appellee and against the plaintiff-appellant (R. 38-44).

The jurisdiction of this Court has been invoked under the provisions of Title 28, United States Code, Sections 1291 and 1294 (28 U.S.C.A. Sections 1291 and 1294), by the filing on February 7, 1957, of a notice of appeal from the judgment of the District Court (R. 44).

II.

STATEMENT OF THE CASE.

Plaintiff, a wholesaler of alcoholic beverages within the State of California, and defendant's predecessor in interest, Calvert Distillers Corporation (hereinafter called Calvert), a distilled spirits manufacturer's agent, entered into a written contract on March 14, 1952 (Plaintiff's Exhibit 1). Under the provisions of the contract plaintiff was appointed as a distributor of

certain alcoholic beverages within the counties of Alameda and Contra Costa in the State of California. The contract term was the period March 14, 1952 to December 31, 1952. The contract contained among others the following four provisions:

“5. Calvert agrees to supply its products to Distributor to the best of Calvert’s ability, but it is understood and agreed that all or some products may not always be available to fill all orders and Calvert shall have the right to allocate to Distributor such proportion of the available supplies of its products as Calvert shall decide in its sole discretion. Calvert reserves the right not to ship any orders received where such orders would result in an inventory in the hands of Distributor greater than a 45-day inventory, based on the rate of sales of Calvert products by Distributor for the six months prior to the date of this contract.”

“11. This contract shall be effective for a period of ten months from March 1, 1952. If distributor desires to renew the contract, he shall so notify Calvert not less than 30 days before December 31, 1952.”

“15. This agreement shall be interpreted under the laws of the State of California.”

“16. This agreement represents the entire agreement between the parties and cannot be modified except in writing duly executed by both parties.”

In plaintiff’s action, which was instituted in the State Superior Court, it sought damages for breach of an alleged implied condition of said written contract and damages for alleged breaches of certain provisions of said contract.

Plaintiff's first cause of action charged that Calvert had breached an implied condition of said contract, namely, that it would continue to employ salesmen for the purpose of soliciting orders for alcoholic beverages from retailers located in Alameda and Contra Costa counties and that all orders so solicited would be submitted to plaintiff for delivery. The breach alleged was that Calvert had continued to employ salesmen and that said salesmen had solicited orders for Calvert products from retailers located in Alameda and Contra Costa counties, but that from and after March 14, 1952, Calvert had refused to submit all such orders to plaintiff for delivery and had submitted a substantial portion of said orders to its other competing distributors for delivery (R. 6-8).

Plaintiff's second cause of action charged that plaintiff during the contract term placed an order with Calvert for 900 cases of Calvert products and that Calvert breached said contract by refusing to fill said order (R. 9).

Plaintiff's third cause of action charged that the contract contained a renewal provision exercisable at the sole and exclusive option of plaintiff. The breach alleged was that plaintiff had given Calvert notice of its election to exercise said option and to renew said contract, but that Calvert had refused to renew the contract (R. 10-12).

Defendant's answer to the charging allegations of plaintiff's first cause of action set forth a general denial of said allegations (R. 16). In addition, defendant

set up the special defense that the alleged condition pleaded in plaintiff's first cause of action was illegal, null and void, because it is unlawful for the defendant under the licenses which it holds in the State of California to solicit or obtain orders for alcoholic beverages from persons licensed by the State of California at retail and/or from unlicensed persons under the provisions of sections 23000 et seq. of the Business and Professions Code of the State of California (R. 17).

Defendant, in its answer to plaintiff's second cause of action, admitted that plaintiff placed the order referred to therein and that defendant did not ship or deliver the merchandise ordered or any portion thereof (R. 18), but set up special defenses based on the provisions of paragraphs 5 and 12 of the contract and on the illegality of the contract as pleaded (R. 18-21).

Defendant, in its answer to plaintiff's third cause of action, denied that provision 11 of the contract was intended by the parties to give plaintiff the sole and exclusive option to renew the contract, denied that plaintiff had the right to elect to renew the contract and denied that plaintiff had the right to renew the contract (R. 23-24). In addition, defendant alleged by way of special defenses that paragraph 11 did not confer and was not intended by the parties to confer upon plaintiff the right to renew said agreement and that the contract as pleaded was illegal (R. 25-26).

After a trial of the factual issues the trial Court made the following findings of fact on the issues raised by the pleadings:

(a) First Cause of Action

(1) "That the allegations contained in paragraph IX of the first cause of action of plaintiff's complaint are, and each of them is, untrue." (R. 39-Finding IV).

(2) "That the allegations contained in paragraph II of defendant's second, separate and distinct defense to plaintiff's first cause of action are, and each of them is, true." (R. 40-Finding V).

(b) Second Cause of Action

(1) "That it is untrue that Calvert Distillers Corporation did not have a lawful reason for not shipping to plaintiff the products requested in its order dated December 15, 1952." (R. 40-Finding VIII).

(2) "That the allegations contained in paragraph II of defendant's second, separate and distinct defense to plaintiff's second alleged cause of action are, and each of them is, true." (R. 40-Finding IX).

(c) Third Cause of Action

"It is untrue that the provisions of paragraph 11 of the contract between Calvert Distillers Corporation and plaintiff dated March 14, 1952, were intended by the parties to mean that in the event the said agreement was then in full force and effect and Key Distributing Co. desired to renew the said agreement, it had the sole and exclusive option to so extend and renew the same upon giving Calvert Distillers Corporation not less than 30 days' notice of such intention prior to December 31, 1952. (R. 41-Finding XI).

From the foregoing findings of fact the trial Court concluded:

(a) "The contract made and entered into by Calvert Distillers Corporation and plaintiff on March 14, 1952, . . . was not breached by Calvert Distillers Corporation in any respect." (R. 41-Conclusion of Law I).

(b) "The contract between Calvert Distillers Corporation and plaintiff dated March 14, 1952, terminated by its terms on December 31, 1952." (R. 42-Conclusion of Law II).

(c) "The provisions of paragraph 11 of the contract . . . did not give plaintiff an option to renew said contract." (R. 42-Conclusion of Law III).

(d) "The contract pleaded in plaintiff's complaint and relied upon by plaintiff in this action was and is illegal, null and void." (R. 42-Conclusion of Law IV).

The final conclusion was that plaintiff take nothing by the action (R. 42-Conclusion of Law V).

III.

ARGUMENT.

A. FIRST CAUSE OF ACTION.

Plaintiff in its first cause of action charged defendant with breach of a specific obligation, namely, that Calvert had refused to submit to plaintiff for delivery all orders solicited by its salesmen from retailers located in Alameda and Contra Costa counties. As such an obligation was nowhere to be found in the contract

between Calvert and plaintiff dated March 14, 1952 (Plt. Ex. No. 1), plaintiff, in a devious attempt to circumvent the California parole evidence rule (Section 1856 of the Code of Civil Procedure) and paragraph 16 of the contract which provides that it represents the entire agreement of the parties and cannot be modified except in writing duly executed by the parties, argues that the alleged obligation was a part of the promotional obligation imposed on Calvert by paragraph 6 of the contract. Plaintiff further argues that under California law it had the right to introduce evidence for the purpose of defining Calvert's promotional obligation and the scope and meaning of the words "to promote" as used in the contract. Even if plaintiff's argument be accepted in toto, plaintiff has not demonstrated that the trial Court erred in denying it relief on its first cause of action. Plaintiff has not shown and cannot show that the record contains evidence which would support a finding that the words "to promote" imposed a duty on Calvert to have its salesmen solicit orders from retailers of alcoholic beverages located in Alameda and Contra Costa counties and submit all such orders to plaintiff for delivery. Although plaintiff in the section of its brief devoted to its first cause of action states that it is normal in the alcoholic beverage industry for sales representatives of distillers and their agents to call upon retailers for the purpose of soliciting orders for their distributors, the record in this case is devoid of evidence of any such custom. From an examination of footnote 8 which appears on page 44 of appellant's opening brief, it is

apparent why plaintiff did not and could not produce evidence that it is the custom of the alcoholic beverage industry for representatives of distillers and their agents to solicit orders from retailers and submit them to any one distributor for delivery, for as such footnote points out such a custom would violate both state and federal statutes proscribing discriminatory treatment of wholesalers similarly situated. Moreover, as will be discussed in the concluding section of this brief the mere solicitation of orders from retailers by representatives of distillers and their agents is illegal under the provisions of the Alcoholic Beverage Control Act of the State of California.

It is respectfully submitted that as the record in this case contains no evidence that Calvert, as alleged in plaintiff's first cause of action, obligated itself to cause its salesmen to solicit orders from retailers located in Alameda and Contra Costa counties and submit all such orders to plaintiff for delivery, the trial Court correctly ruled in denying plaintiff relief on its first cause of action, which relief was sought by reason of an alleged breach of said obligation.

B. SECOND CAUSE OF ACTION.

Paragraph V of the contract between Calvert and plaintiff provides in part as follows:

“. . . Calvert reserves the right not to ship any orders received where such orders would result in

an inventory in the hands of Distributor greater than a 45-day inventory, based on the rate of sales of Calvert products by Distributor for the six months prior to the date of this contract.”

Defendant in its second separate defense to plaintiff's second cause of action quoted this paragraph and alleged that the order referred to in the second cause of action was not shipped to plaintiff because the order would have resulted in an inventory of defendant's products in the hands of plaintiff greater than a 45-day inventory, based on the rate of sales of defendant's products by plaintiff for the six months prior to the date of the contract between the parties dated March 14, 1952 (R. 19-20). In support of this defense defendant introduced into evidence its answer to Interrogatory No. 21 propounded it by the plaintiff in this action (R. 29-30; R. 100). This answer established that plaintiff's order of December 15, 1952, if filled by defendant, would have resulted in an inventory of the products ordered in the hands of plaintiff greater than a 45-day inventory based on the rate of sales of said products by plaintiff for the six months prior to the date of the contract between the parties (R. 100). Based on this evidence the trial Court found that plaintiff's allegation that defendant failed to ship said order without lawful reason therefore was untrue (R. 40), and concluded that defendant had not breached the contract by failing to ship said order (R. 41).

Plaintiff claims that the trial Court's finding and conclusion are erroneous for the following reasons:

(a) It was not averred that the order was rejected because it would have resulted in “an excessive inventory” as described in paragraph 5 of the contract.

In answer defendant can only direct the Court’s attention to its second defense to the second cause of action where it is specifically alleged that the order was not shipped because it would have resulted in “an excessive inventory” (R. 19).

(b) There was no showing that defendant’s refusal to ship the order was stated to have been made upon the ground that it would have resulted in “an excessive inventory”.

In answer defendant can only direct the Court’s attention to the provisions of paragraph 5 of the contract which gave defendant the unqualified right to refuse shipment of any order which would have resulted in “an excessive inventory” and imposed no obligation on defendant to notify plaintiff that any particular order was being rejected for said reason.

(c) There was no showing as to the date of arrival of the ordered merchandise or of the inventory on the date when it would have been delivered.

Defendant submits that such a showing was not necessary to sustain its special defense for it is manifest from a reading of the provisions of paragraph 5 of the contract that the inventory used by defendant in determining whether any particular order would result in “an excessive inventory” would be the inventory existing as of the date of the order. This must follow because of the fact that the determination of

whether any particular order would result in "an excessive inventory" was to be based on plaintiff's rate of sales for the six months prior to the date of the March 14, 1952 contract and not on plaintiff's actual sales for any particular period during the term of the contract. Inasmuch as the determination of whether any particular order would result in "an excessive inventory" had to be made prior to the shipment of the order, provision 5 could operate in no other manner because prior to the shipment of the order defendant would have no way of knowing what plaintiff's sales would be during the period between the date of receipt of the order and the date the merchandise ordered was delivered.

(d) Defendant's showing ignored the fact of common knowledge that the sales of alcoholic beverages during the month of December exceeds the rate of sales in any other period during the year.

Here again defendant submits that plaintiff's actual sales during any particular period are not relevant, for the reason that the determination of whether any particular order would result in "an excessive inventory" was to be based on plaintiff's rate of sales during the six month period preceding the date of the contract.

(e) Defendant did not act upon any such excuse for not shipping said order in the Court below.

In answer defendant directs the Court's attention to page 99 of the record where the following appears:

"Mr. Ehrlich. This shows the plaintiff's sales to retailers September, 1951, to February, 1952, that

is, the preceding six months, which permits us to, we contend, reject your order on the basis of the average 45-day inventory.”

Defendant respectfully submits that the record clearly supports the trial Court’s finding that plaintiff’s allegation that defendant failed to ship said order without lawful reason therefor was untrue and its conclusion that defendant did not breach the contract between the parties by failing to ship said order. It is clear from the record that plaintiff’s order of December 15, 1952, would have resulted in “an excessive inventory” in plaintiff’s hands within the meaning of the provisions of paragraph 5 of the contract, and that accordingly as determined by the trial Court defendant had legal justification for refusing to fill said order.

C. THIRD CAUSE OF ACTION.

It is apparent from a reading of appellant’s opening brief that both plaintiff and defendant are in agreement that the question of whether paragraph 11 of the contract gave plaintiff an option to renew the contract, depends solely on the resolution of a question of law. Although the trial Court correctly found in finding XI that it was untrue that the parties intended by the provisions of paragraph 11 to give plaintiff an option to renew the contract inasmuch as plaintiff introduced no evidence to support this allegation, defendant submits that the crucial question to be decided by this Court is whether the trial Court was correct in deciding as a matter of law that “The provi-

sions of paragraph 11 of the contract between Calvert Distillers Corporation and plaintiff dated March 14, 1952, did not give plaintiff an option to renew said contract.” (R. 42).

Although plaintiff attempts to make much of defendant’s admission that plaintiff interpreted the contract as conferring upon it the right of renewal, which admission was occasioned by the language used in plaintiff’s letter to Calvert dated November 18, 1952 (Plt. Ex. No. 3), it is clear from the language of said letter that Calvert prior to the date of the letter had taken the position that plaintiff had no such right.

Moreover as neither plaintiff nor defendant introduced any evidence as to what was intended by the parties by paragraph 11 and as no evidence of intention could have been introduced because the provision is neither uncertain nor ambiguous (Code of Civil Procedure, Sec. 1856), defendant submits that the question of whether paragraph 11 did or did not create an option to renew the contract can only be determined by an examination of the provisions of said paragraph. Paragraph 11 reads as follows:

“This contract shall be effective for a period of 10 months from March 1, 1952. If distributor desires to renew the contract, he shall so notify Calvert not less than 30 days before December 31st, 1952.”

Defendant submits that it is clear that this provision created no contractual right to renew in plaintiff. The clause means what it says. It gave plaintiff no right or option to renew at plaintiff’s election. The clause pro-

vides for notice in case a desire for renewal existed on the part of the plaintiff, but it contains no words of promise or undertaking on the part of defendant to renew on receipt of said notice. That words of promise or undertaking on the part of one contracting party are necessary in order to create a right in the other is well illustrated by the cases cited on pages 65-68 of appellant's opening brief. In every case cited therein it will be noted that the optionor expressly agreed to perform. For example:

Anderson v. Bills, 335 Ill. 524, 167 N.E. 864, "Now, therefore, in consideration of the premises . . . *A hereby agrees to purchase* from B the above described land for dollars at any time within five years from this date, provided notice is given by B to A on or before September 1st of any year that B desires A to take said lands . . ." (emphasis supplied).

Brooks v. Trustee Co., 76 Wash. 589, 136 P. 1152, ". . . *we hereby agree* that after you have consulted your sister or anyone else in regard to this investment you desire to withdraw your investment you may at any time return these bonds . . ." (emphasis supplied).

Carter v. Love, 206 Ill. 310, 69 N.E. 85 ". . . Now, if the said M. G. Love shall at any time before the expiration of this option so desire, *I agree, in consideration of the sum of \$9,240 to convey* to said M. G. Love, or as he shall direct, . . ." (emphasis supplied).

Bras v. Sheffield, 49 Kan. 702, 31 P. 306 ". . . *And it is further covenanted and agreed by the said parties* that the said Charles Bras shall have

the right to purchase, if he so elect, at the stipulated sum of twelve hundred dollars, . . .” (emphasis supplied).

Comstock Bros. v. North, 88 Miss. 754, 41 So. 374, “. . . and if, at the expiration of the time or February 1st, 1904, you decide to take this land, we will sell you eight-ninths . . .” (emphasis supplied).

Dawson v. Goff, 43 C. 2d 310, 273 P. 2d 1, “. . . The undersigned hereby agree to purchase from you upon demand written or verbal . . . not to exceed forty thousand (40,000) common shares . . .” (emphasis supplied).

The above examples clearly demonstrate that paragraph 11 created no contractual right in plaintiff, because it contains no words of promise or undertaking on the part of defendant.

The statement that if the distributor “desires to renew . . . he shall so notify Calvert not less than 30 days before December 31, 1952” was obviously designed to give defendant at least 30 days to find another distributor in the event plaintiff did not desire to continue. It was certainly not designed to give plaintiff an option to renew irrespective of defendant’s wishes and irrespective of its performance under the contract.

Dealing with contract clauses somewhat similar to paragraph 11 and supporting defendant’s contentions above referred to are the cases of *Gardella v. Greenburg*, 242 Mass. 405, 136 N.E. 106 and *Bernstein v. Smith*, 194 N.Y. Supp. 789.

In *Gardella v. Greenburg*, supra, the Court had the following provision before it for construction:

“It is agreed that six months written notice before the termination of this lease shall be given by either of said parties to the other in event that either of said parties desire(s) a renewal of said lease, and failure to give said notice shall be regarded as an intention on the part of the parties failing to give the same that said lease shall not be renewed.”

The lessee gave notice in which he claimed to exercise an option of renewal. The lessor replied she did not care to accept any offer of renewal. In ruling that the covenant construed did not entitle the lessee to a new lease, the Court stated:

“The troublesome question is whether the quoted words create a contractual right in both parties. They provide for notice in case either desires to renew, and that the failure to give it shall be regarded as manifesting an intention to the contrary. Instead of declaring plainly and unmistakably that there should be a right to renew (*Cloverdale Co. v. Littlefield*, 240 Mass. 129, 133 N.E. 565), or such a privilege (*Leavitt v. Maykel*, supra), or a privilege and right (*Ferguson v. Jackson*, 180 Mass. 557, 62 N.E. 965), or the refusal of a definite extension (*Tracy v. Albany Exch. Co.*, 7 N.Y. 472, 57 Am. Dec. 538), *the covenant provided for notice in case a desire for a renewal existed on the part of either lessor or lessee. A desire to have a lease is not equivalent to a right thereto.* Not only is provision made for the manifestation of this wish, but it is declared with equal definiteness that the failure to give notice

shall be 'regarded as an intention' that the lease shall not be renewed. The negative intent manifested by failure to give notice is on an equal footing with the desire declared by giving one. One provision is as strong as the other. *Construing them together, we think that the true interpretation of the covenant is that it furnished a timely means of information whether the parties were willing to execute another lease on the same terms.* There are no words indicating a right in the lessor to bind the lessee beyond the expiration of the term, or to obligate the lessor in like manner. The covenant did not create an absolute and unqualified right in either." (Emphasis supplied).

In *Bernstein v. Smith*, 194 N.Y. Supp. 789, affirmed without opinion in 198 N.Y. Supp. 901, the Court held that no right of renewal was given by a provision in a lease that "the tenant hereby expressly agrees to give formal written notice to the landlord of tenant's wish as to continuance of the tenancy beyond the term hereby granted." In so holding, the Court stated:

"While we agree in the view that the court should endeavor to give effect to every stipulation of an agreement, there is a limit beyond which contractual intention cannot be read into language which does not express it, either in words or by reasonable implication. It is conceivable that the landlord of such premises would desire to know, several months in advance of the end of the term, whether the tenant intends to stay for another year, and make arrangements accordingly, and there seems no room for doubt that it is just what the language quoted means—an agreement on the part of the tenant to express in writing, on or be-

fore January 15, whether he wishes to renew his lease . . .”

Defendant submits that paragraph 11 of the contract created no contractual right in plaintiff, and that the trial Court's decision so holding must be affirmed. The provision contains no words of promise or undertaking on the part of defendant to renew on receipt of notice that plaintiff desired to renew. The provision does not provide that plaintiff had the right to renew or the privilege of renewing, but only provides for notice in case a desire for renewal existed and paraphrasing the Court in *Gardella v. Greenburg*, supra; “A desire to have a contract is not equivalent to a right thereto”.

Moreover, it is well settled that a renewal provision such as is before the Court must be construed strongly in favor of the grantor (*Pyrate Corporation v. Sorenson* (C.C.A., 9th—1930), 44 F. 2d 323; Williston on Contracts, sec. 620).

In closing this section of its brief defendant desires to point out that appellant in its opening brief claims the benefit of certain canons of construction, namely, (1) that in case of doubt the Court will follow the construction placed upon the contract by the parties, (2) that in case of doubt the Court will construe the words of the contract most strongly against the party who used them in the preparation of the contract and (3) that the renewal provision must be construed as having been intended to mean something and that “something” is to be determined in the light of the under-

standing of the ordinary person. Defendant submits that canons (1) and (2) are not applicable on the facts of this case because there is no doubt as to what paragraph 11 means. Defendant agrees with canon (3) and submits that paragraph 11 means what it says, "that if the distributor desires to renew he shall so notify Calvert" and not as contended by plaintiff that plaintiff shall have the unilateral right to renew the contract.

Defendant has no quarrel with the remaining portion of appellant's brief devoted to its third cause of action. Defendant agrees that irrevocable offers may be addressed to the desire, wish, election and choice of the offeree and that a contract comes into being upon the communication of the acceptance of an offer. However, defendant fails to see how these abstract propositions of law aid plaintiff's position. Defendant submits that the only question to be decided is whether the trial Court was correct in its decision that the provisions of paragraph 11 of the contract did not give plaintiff an option to renew the contract, and further submits that said question must be answered in the affirmative based on the literal wording of paragraph 11.

IV.

DEFENDANT'S SPECIAL DEFENSE OF ILLEGALITY.

Defendant set up as a special defense to each cause of action of plaintiff's complaint that the contract as pleaded in plaintiff's complaint was illegal, null and void. This defense was based on the fact that plaintiff

had pleaded that one of the conditions of the written agreement was that Calvert agreed to promote the sale of its products by causing its salesmen to solicit orders from retailers and submit the same to plaintiff for delivery, and that such an agreement violated the provisions of the Alcoholic Beverage Control Act which made it unlawful for Calvert under the licenses which it held in the State of California to solicit or obtain orders for alcoholic beverages from retailers.

Although plaintiff throughout its brief takes the position that the trial Court resolved this action in favor of defendant because it found that defendant had established its special defense of illegality, it is clear that such is not the case because the trial Court found that defendant had not agreed to perform the acts on which its defense of illegality was based (R. 39—Finding IV). Therefore the question of whether the contract as pleaded in plaintiff's complaint is illegal is not before this Court.

However, as plaintiff has seen fit to argue the question in its brief, defendant feels that it is constrained to answer said argument.

In paragraph V of plaintiff's complaint (R. 5), plaintiff alleges that defendant is not authorized by its California licenses to enter into, or conduct, or participate in, any transaction respecting alcoholic beverages and, more particularly, a sale thereof as defined in the Alcoholic Beverage Control Act of the State of California with persons licensed to sell alcoholic beverages at retail to unlicensed persons. Defendant in its answer admitted said allegation (R. 14).

The Alcoholic Beverage Control Act defines the words sell, sale and to sell as follows:

“ ‘Sell’ or ‘sale’ and ‘to sell’ includes any transaction whereby, for any consideration, title to alcoholic beverages is transferred from one person to another, and includes the delivery of alcoholic beverages pursuant to an order placed for the purchase of such beverages *and soliciting or receiving an order for such beverages, . . .*” (Business and Professions Code, Sec. 23025) (Emphasis supplied).

In paragraphs VII and IX of its first cause of action (R. 6-8), plaintiff alleges that defendant agreed to promote the sale of its products by continuing to employ salesmen within the counties of Alameda and Contra Costa for the purpose of soliciting orders and sales for defendant’s products from others than wholesalers, manufacturers and rectifiers and submitting said orders to plaintiff for delivery.

If paragraphs V, VII and IX of plaintiff’s first cause of action are read together we find that plaintiff has pleaded that as a part of the consideration for its promise to purchase defendant’s products, defendant agreed to cause its salesmen to solicit orders from retailers of alcoholic beverages in violation of the Alcoholic Beverage Control Act of the State of California (Business and Professions Code, sec. 23366).

If defendant had so agreed, defendant submits that plaintiff would not have been entitled to recover in this action for the reason that it was seeking recovery for breaches of an illegal contract.

In this connection section 1667 of the Civil Code of the State of California provides:

“That is not lawful which is:

1. Contrary to an express provision of law;
2. Contrary to the policy of express law, though not expressly prohibited; or
3. Otherwise contrary to good morals.”

It is well settled that a valid contract cannot be founded on an illegal consideration.

King v. Johnson, 30 C.A. 63;

Losson v. Blodgett, 1 C.A. 2d 13;

Asher v. Johnson, 26 C.A. 2d 403.

It is further well settled that if any part of several considerations for a single object is unlawful, the entire contract is void.

Civil Code, sec. 1608;

Fewel & Dawes v. Pratt, 17 C. 2d 85;

Conte v. Busby, 115 C.A. 732.

Defendant respectfully submits as it could not legally under the licenses it holds in the state of California solicit orders from retailers, that if it had agreed to do so as alleged by plaintiff the contract between Calvert and plaintiff being based on an illegal consideration would have been void under the authorities set forth above.

Plaintiff in its brief contends that section 23773 of the Business and Professions Code which reads as follows:

“The provisions of sections 23771 and 23772 do not prevent agents or employees of a distilled

spirits manufacturer located without this State from soliciting orders for distilled spirits within the State.”

specifically exempts from all restrictions the practice defendant claims is illegal, to-wit, soliciting orders from retailers.

Plaintiff here attempts to practice a deception on this Court for it is clear that section 23773 does not authorize holders of manufacturer’s agent’s licenses in California to solicit orders from retailers.

It is obvious that the section was designed so as to allow out of State manufacturers holding interests in California wholesaler’s, rectifier’s or retailer’s licenses to promote the sale of their products in California even though section 23772 would prevent them from obtaining a license and that the section was inserted by the legislature to eliminate the possibility that sections 23771 and 23772 would be held unconstitutional on the ground they created an undue burden on interstate commerce. The so-called official interpretation of section 23773 set forth on page 45 of appellant’s opening brief is clearly not an interpretation of said section but is merely a definition of the rights of holders of manufacturers’ agents’ licenses in California. Moreover, defendant fails to see any language in said “official interpretation” which authorizes solicitation of orders from retailers. If promotional representatives of manufacturers’ agents are not allowed to receive signed orders from the retail trade as stated in said “official interpretation,” it is clear that Calvert was not authorized by its man-

ufacturer's agent's license to cause its salesmen to solicit orders from retailers and submit them to plaintiff for delivery. This must follow for Calvert could not submit an order to plaintiff for delivery until it had first been obtained from the retailer and the so-called official interpretation states that this is not authorized.

Defendant again respectfully submits that if it had agreed to solicit orders from retailers as alleged by plaintiff, the contract between Calvert and plaintiff being based on an illegal consideration would have been void and plaintiff would have been entitled to no relief in this action.

V.

CONCLUSION.

Defendant respectfully submits that the trial Court committed no error in this proceeding and that the judgment should be affirmed.

Dated, San Francisco, California,

July 22, 1957.

Respectfully submitted,

PHILIP S. EHRlich,

IRVING ROVENS,

Attorneys for Appellee.

No. 15,480

IN THE

**United States Court of Appeals
For the Ninth Circuit**

J. C. MILLETT Co., a corporation doing
business as Key Distributing Co.,
Appellant,

vs.

DISTILLERS DISTRIBUTING CORPORATION,
Appellee.

Appeal from the United States District Court for
the Northern District of California,
Southern Division.

APPELLANT'S CLOSING BRIEF.

J. ALBERT HUTCHINSON,
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Attorneys for Appellant.

FILED

AUG 15 1957

PAUL P. O'BRIEN, CLERK

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APPELLANT'S CLOSING BRIEF.

FOREWORD.

The within closing Brief of Appellant follows as closely as possible the Argument in Paragraph III and Citations contained in Paragraph IV Appellee's Brief, in the order and under the caption they appear in that Brief; only the paragraph numbers differ. "A. B." indicates "Appellee's Brief" followed by the page number in which the quotations appear therein.

ARGUMENT.**A. FIRST CAUSE OF ACTION.**

Appellee's concluding statement as to the First Cause of Action (A.B. p. 9) reads as follows:

“It is respectfully submitted that as the record in this case contains no evidence that Calvert, as alleged in plaintiff's first cause of action, obligated itself to cause its salesmen to solicit orders from retailers located in Alameda and Contra Costa counties and submit all such orders to plaintiff for delivery, the trial court correctly ruled in denying plaintiff relief on its first cause of action, which relief was sought by reason of an alleged breach of said obligation.”

The record does NOT support that conclusion; it shows that Calvert did obligate itself to “promote the sale of its products” (par. 6, Exhibit 1; Appendix to Appellant's Opening Brief, page iv). The evidence shows just how this was done: Franklin Lewis, formerly employed as one of the “specialty men” by defendant during the effective period of the contract between the parties, testified as follows:

“Q. What if anything was said with regard to promotions by you in your work in the Key Distributing branch of the plaintiff?”

A. I was told specifically—there was another man involved in this, too. We were both told to withdraw all support to Key Distributing Company and not even to put—this isn't a direct quote, but this is as close as I can remember—not even to put our foot in the door.” (Tr. pages 129-130.)

“Q. After you were so directed by Mr. Garfield, and either Mr. Taube or Mr. Garfield in Mr. Taube’s presence, did you then give any assistance to Key Distributing branch of the plaintiff?”

A. None whatever.

Q. In the event a retailer appeared in need or expressed a desire to purchase Calvert products, what if anything were you instructed to say to him in that connection?

A. Well merely—I mean, it’s a trick of the trade. It’s a way to emphasize one and de-emphasize the other, and over the years you know how to do that.

* * *

Q. And after that time, in the month of June or July 1952, until the end of the year did you go to the Key Distributing branch of plaintiff in connection with your work for Calvert?

A. As everything else at Calvert, they signed the check. I did what they told me to do. I don’t think I even walked inside the door.

Q. And you gave no help whatever?

A. None whatever.” (Tr. pages 129-131.)

It is plain that whether or not plaintiff is entitled to any recovery on the First Cause of Action depends on: (1) what defendants actually agreed to do in the written agreement to help sales with promotion and advertising; and (2) what they actually did or *failed to do* under that agreement. And on this theory the trial Court was in error.

B. SECOND CAUSE OF ACTION.

Appellee's concluding statement as to the Second Cause of Action (A.B. p. 13) reads as follows:

“It is clear from the record that plaintiff's order of December 15, 1952, would have resulted in ‘an excessive inventory’ in plaintiff's hands within the meaning of the provisions of paragraph 5 of the contract, and that accordingly as determined by the trial Court defendant had legal justification for refusing to fill said order.”

The facts and figures relating to the Second Cause of Action have been stated fully in Appellant's Opening Brief, pages 15-19, and will not be repeated here.

The point Appellant wishes to make in this connection, however, is that Appellee's theory is based on the assumption that the contract between the parties automatically terminated December 31st, 1952, which is not *conceded*. In this connection it should be noted particularly that, under the provisions of paragraph 11 of the written agreement plaintiff gave written notice to the defendant that plaintiff has elected to exercise the option to extend the agreement on November 18, 1952 (see exhibit 3 to complaint) and the written order relating to the 900 cases which defendant failed to ship was dated December 15, 1952. If it develops that plaintiff was entitled to exercise that option, this 900 case order was essential to the continuity of the distributorship, and should be considered in relation to the Second Cause of Action, in addition to all other factors.

C. THIRD CAUSE OF ACTION.

Appellee's concluding statement as to the Third Cause of Action (A.B. p. 20) reads as follows:

"... Defendant agrees that irrevocable offers may be addressed to the desire, wish, election and choice of the offeree and that a contract comes into being upon the communication of the acceptance of an offer. However, defendant fails to see how these abstract propositions of law aid plaintiff's position. Defendant submits that the only question to be decided is whether the trial Court was correct in its decision that the provisions of paragraph 11 of the contract did not give plaintiff an option to renew the contract, and further submits that said question must be answered in the affirmative based on the *literal wording* of paragraph 11." (Emphasis added.)

The authorities supporting Appellant's position with respect to the Third Cause of Action are fully stated in the Appellant's Opening Brief at pages 54-74 and, with two minor exceptions will not be repeated here.

Par. 11 of the written agreement between the parties (Exhibit 1 attached to the complaint; Appendix, Appellant's Opening Brief, page v) reads as follows:

"This contract shall be effective for a period of ten months from March 1, 1952. If Distributor desires to renew the contract, he shall so notify CALVERT not less than 30 days before December 31st, 1952."

It should be pointed out at the outset that there is no other provision in the written agreement relating to or in any way connected with the renewal provision and, to adopt Appellee's phraseology, the answer must be found in the "literal wording" of the above provision rather than *outside* of it. With this thought in mind we ask in all earnestness: (1) How would the average business man, such as the plaintiff here, have the right to interpret the phrase "If Distributor desires to renew the contract, he shall so notify CALVERT not less than 30 days before December 31st, 1952"? (2) How did the defendant *think* that provision would be interpreted when it inserted it in the agreement it prepared? (3) If defendant had in mind an unstated qualification when that provision was inserted in the agreement, or an interpretation which was not justified by the wording of it, why didn't defendant communicate such qualification or interpretation to the plaintiff at the time or before the agreement was executed?

Professor *Williston* provides the answer in his *Work on Contracts*, 4th edition, Section 1027-A which reads in part:

"* * * Nor must it be overlooked that these elaborate instruments are almost invariably drawn by or on behalf of the manufacturer and presented to the dealer simply for his signature on the dotted line. The very fact that so frequently this carefully drawn instrument leaves the question of its termination, 'an obligation incompletely expressed,' and the startling disproportionate burden otherwise cast upon the dealer should here,

as in the requirement and output contracts, justify the courts in inferring an intention to bind both parties for at least such time as may be required to demonstrate the cause * * *.”

AS TO THE DEFENSE OF ILLEGALITY OF THE CONTRACT.

A. RELEVANT PORTION OF THE CONTRACT AS IT READS.

Paragraph 6 of the written contract between the parties, dated March 14th, 1952, which is marked “Exhibit 1” and attached to the original complaint (Appendix, Appellant’s Opening Brief, page iv), reads as follows:

“6. CALVERT agrees to promote the sale of its products and to advertise its products in a manner consistent with the type of merchandise and the cases sold. CALVERT shall have the sole right to determine the amount of sales promotion and advertising and the media used for advertising.”

B. RELEVANT EVIDENCE OF WHAT ACTUALLY HAPPENED.

The testimony of Franklin Lewis, called for the plaintiff, shows that he was a former employee of defendants and worked for them from February 1947 until October 14, 1956 (Tr. p. 113) which included the period covered by the contract between plaintiff and defendants, i.e. from March 1, 1952 until December 31st, 1952. That testimony reads in part, and so far as material to illustrate the point here made, as follows:

“Q. Will you tell us briefly what you did in conjunction with your work for your employer, Calvert, in dealing with the Key Distributing branch of the plaintiff?

A. My work consisted of promoting the sale of Calvert merchandise by placing point of sale material; showing our newspaper, magazine, billboard and card programs; to tell the Calvert story.” (Tr. page 117.)

* * *

“Q. Now, in your independent calls on retailers what happened, if it did happen, when the retailers needed some further Calvert products to complete his stock or, if he didn’t have any, to install the item in his place? What would you do if you found that situation?

A. You mean what I did leading up to the actual sale, *which I cannot write?* (Emphasis added.)

Q. That is right.

A. Allowing that there was any appreciable quantity, contact the wholesaler specified by the retailer, and *he would consummate the sale if possible*, either with the help of a specialty man or by himself.” (Tr. page 124.)

C. CHARGING ALLEGATIONS IN ORIGINAL COMPLAINT.

Paragraphs VII and IX of the First Cause of Action of the complaint originally filed *alleged*, briefly, in par. VII (Tr. page 6) that defendants have employed specialty men and directed and required them to call upon customers of the distributor in purported

support of the sale of defendants' products . . . and have submitted the orders so solicited and obtained to defendants' said distributors for delivery thereof. Par. IX (Tr. pages 7-8) *alleged* briefly that one of the conditions of the said written agreement was that the defendants agreed to promote the sale of its products by continuing to employ salesmen sometimes known as "specialty men" . . . and submit the orders so solicited and obtained . . . to the Key Distributing Co. for delivery.

D. COMMENT.

It is clearly apparent that counsel for Appellee is trying to determine the legality of the contract in this case by the *charging allegations* in the complaint rather than by (1) the contract as it was prepared by the defendant itself (see Tr. p. 78) and (2) by what the evidence shows was actually done under that provision of the contract. For the sake of brevity, and since Appellee has cited no authorities to show that this can be done, no authorities will be given here to show that such a theory is not, and cannot, be supported by any known rule of law.

**E. PROPOSED AMENDMENTS TO COMPLAINT
TO CONFORM TO PROOF.**

Par. IX of the Amended Complaint offered to be filed, which appears on Tr. pp. 31-32, reads in part as follows:

“One of the provisions of the said written agreement, in par. 6 thereof, specified as follows:

Calvert agrees to promote the sales of its products and to advertise its products in a manner consistent with the type of merchandise and the cases sold. * * *

Said provision was intended to, and did operate for the joint benefit of plaintiff and defendants in this, that it enabled plaintiff to make a substantial number of sales of defendants' products to plaintiff's customers. Pursuant to the said provisions the defendants did maintain such specialty men to promote sales and advertise its products in the counties of Alameda and Contra Costa wherein the said written agreement was operative. * * * ”

F. ASSUMING, WITHOUT CONCEDED, THERE WAS A VIOLATION.

As already pointed out in the preceding comment, neither the contract, as written up by defendant, nor the evidence of how the provisions relating to the plan of promotion therein described, violate any cited or any known law, rules or regulations. However, assuming for the purpose of this discussion only, without conceding, that the provisions of par. 6 of the contract cited above was in violation of any existing law or regulation, where would that lead to?

“Where a contract has several distinct objects, of which at least one is lawful, and one at least is unlawful, the contract is void as to the latter and valid as to the former.”

Sec. 1599 Civil Code of California.

“A bargain that is illegal only because of a promise or provision for a condition, disregard of which will not defeat the primary purpose of the bargain, can be enforced with the omission of the illegal portion by a party to the bargain who is not guilty of serious moral turpitude unless this result is prohibited by statute. Recovery is more readily allowed where there has been part performance of the legal portion of the bargain.”

Restatement of the Law of Contracts, sec. 603,
page 1119.

The written agreement, which is appended to the original complaint and marked Exhibit 1, shows that the objects and considerations for the agreement included—in the order in which they appear in that agreement:

1. Appointment by Calvert of Millett as distributor;
2. Acceptance by Millett from Calvert of the distributorship;
3. Maintenance of established prices;
4. Manner of invoicing and payment;
5. Manner of shipping by Calvert to Millett;
6. Agreement by Calvert to “promote sale of its product”;
7. Agreement by distributor to maintain adequate sales force;
8. Agreement by distributor to maintain adequate inventory;

9. Agreement by distributor not to undertake additional competing lines;
10. Agreement as to prices to be charged and paid for;
11. Provisions relating to renewal of the agreement;
12. Provisions applicable if agreement not renewed;
13. Provisions as to waiver of partial non-compliance;
14. Provisions relating to change in ownership.

In interpreting a similar distributorship contract, the Court stated:

“The distributorship contract in the case at bar is more than a contract of employment or agency. It is also a contract of sale. On the other hand, it is more than a mere sales contract. It partakes of the substantial aspects of both.”

J. C. Millett Co. v. Park & Tilford, 123 Fed. Supp. 484 at 492.

**G. AUTHORITIES CITED BY APPELLEE
NOT APPLICABLE HERE.**

Section 23025 of the *Business and Professions Code* cited on page 22 of Appellee’s Brief is not applicable because: (1) the words “Sell” or “Sale” or “to Sell” do not appear in the agreement as written; and (2) the evidence does not show any “Sale” was actually made under that agreement.

Appellee states (Appellee's Brief, page 23) that "a valid contract cannot be founded on an illegal consideration" and cites cases which purportedly support that statement. However, those cases do not remotely support that statement as shown below, and turned on entirely different facts not remotely resembling the facts in this case. Thus

King v. Johnson, 30 Cal. App. 63. This was an action to recover commission on the sale of real property. There was an agreement to subdivide the land before it was sold, but no map was ever filed nor any attempt made to comply with the provisions of Statutes of 1907 p. 290. Sec. 8 of that act prohibited the sale of land without prior compliance. Sec. 9 of that act expressly prohibited such a sale. The Court held the agreement invalid.

Losson v. Blodgett, 1 Cal. App. 2d 13. That case involved an agreement for the purchase and sale of land in Mexico. The constitution of Mexico prohibited defendants, as American citizens, from owning real property in the particular territory where the property was situated. The basis for the decision in that case is stated on page 18 of the text, where the Court said: "Plaintiff contracted to convey title to Mrs. Blodgett and this he could not legally do. If the consideration for a contract is unlawful, the contract is void."

Asher et al. v. Johnson, 26 Cal. App. 2d 403. That was an action by several plaintiffs to recover from the Board of Equalization sales taxes paid under protest

on income derived from the operation of gambling devices which were prohibited by law. The gist of the decision is stated on page 417 of the text which reads as follows: "For the reason that the funds upon which the levies of taxes were imposed were derived from illegal games of chance (instead of tangible personal property) we are of the opinion that the trial Court erroneously rendered judgment in favor of Respondents." (Board of Equalization.) (Matters in parenthesis added.)

Section 1608 of the *Civil Code* of the State of California, cited on page 23 of Appellee's Brief is not applicable in this case because: (1) there is no "single" consideration in this case for one or more of its objects; and (2) there are no several considerations for a "single" object. On the contrary, we have in this case at least 14 separate considerations and at least 14 separate and distinct objects to be accomplished under the written agreement.

Fewel & Dawes v. Pratt, 17 Cal. 2d 85. In that case defendant Pratt was a licensed insurance broker. He sold some life insurance policies to one Bullock. Later Bullock said to Pratt he would take additional policies if Pratt would divide his commission with Bullock's son-in-law, to which Pratt agreed. The son-in-law whose name was Fewel, was not licensed as an insurance broker. Fewel then formed a corporation who obtained a license as insurance broker and assigned his agreement with Pratt to the corporation. Pratt did not pay the commission to Fewel or the

corporation, and was sued on his obligations, and his defense was that the claim was in violation of Sec. 1714 of the Insurance Code, which provided that: "any person who shall act or offer to act or assume to act as a life insurance broker or agent, unless licensed by the insurance commissioner as provided in this section . . . shall be guilty of a misdemeanor."

The Supreme Court held (at page 90) that Fewel not only had no license at the time he entered into the contract with Pratt for a division of the commission, but never acquired one thereafter, and hence he was not entitled to recover direct or through an assignee.

Conte v. Busby, 115 Cal. App. 732. The gist of this case is stated on page 734 of the text in which the Appellate Court said: "The trial Court found that the indorsement by Busby of the draft was in consideration of and for the purpose of enabling her to conduct a house of prostitution, which is declared an unlawful act." Based on that finding, the Appellate Court held (at page 734) "The case is controlled by the general principle that where a part of a consideration for one or more objects is void the whole contract is void."

The significant fact in this case is that the original action included, besides the draft which was considered illegal, a cash item of \$145.00 and the trial Court gave plaintiff judgment for the \$145.00 only, which judgment was not disturbed on appeal.

CONCLUSION.

It is respectfully submitted that under the agreement as written, the facts and the evidence in this case, and the law applicable thereto, the Findings and the Judgment of the trial Court are erroneous. The judgment ought to be reversed as to all three causes of action in the complaint, with directions to allow the proposed Amended Complaint to Conform to Proof to be filed, proceed to take evidence on the question of damages which was reserved at the time of the trial, then enter judgment in favor of plaintiff and against defendant for such amount of damages on each of the three causes of action as the evidence may justify.

Dated, San Francisco, California,
August 14, 1957.

J. ALBERT HUTCHINSON,
LEON A. BLUM,
By J. ALBERT HUTCHINSON,
Attorneys for Appellant.

No. 15480

United States
Court of Appeals
for the Ninth Circuit

J. C. MILLETT CO., a corporation doing business
as Key Distributing Co., Appellant,

vs.

DISTILLERS DISTRIBUTING CORPORA-
TION, Appellee.

Transcript of Record

Appeal from the United States District Court for the
Northern District of California,
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FILED

MAY 14 1957

PAUL P. O'BRIEN, CLERK

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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In the Superior Court of the State of California in
and for the City and County of San Francisco

No. 441111

J. C. MILLETT CO., a corporation, doing business
as KEY DISTRIBUTING CO., Plaintiff,

vs.

CALVERT DISTILLERS CORPORATION;
CALVERT DISTILLING CO.; CARSTAIRS
BROS. DISTILLING CO., INC.; WHITE
COMPANY, a fictitious corporation, and
BLACK CO., a fictitious partnership,
Defendants.

COMPLAINT FOR DAMAGES FOR BREACH
OF CONTRACT

Plaintiff complains of defendants and for a First
Cause of Action alleges:

I.

Plaintiff J. C. Millett Co. is a corporation organized and existing under the laws of the State of California. At all times herein mentioned plaintiff has been and still is the licensee and holder of licenses lawfully issued permitting plaintiff to engage in the importation and wholesale distribution of alcoholic beverages within the State of California.

II.

At all times herein mentioned plaintiff did, and

still does, own and operate the Key Distributing Co. as a division of the J. C. Millett Co. in the City of Oakland, County of Alameda, State of California. Heretofore plaintiff filed with the County Clerk of the said County a certificate of doing business under the fictitious name of Key Distributing Co. in compliance with the provisions of section 2466 of the Civil Code of this State, and published such certificate in the manner and for the time specified in section 2468 of the Civil Code of this State.

III.

At all times herein mentioned plaintiff did, and still does, own and operate the Monterey County Liquor Co. in Salinas, California.

IV.

Plaintiff is informed and believes and upon that ground alleges that the Calvert Distillers Corporation, named as one of the defendants herein, is a corporation duly organized and existing, and that the said corporation has been domesticated and authorized to do business in the State of California, and is therefore subject to the process of this Court. Plaintiff is likewise informed and believes that the Calvert Distilling Co. and the Carstairs Bros. Distilling Co. Inc. are and each of them is a corporation duly organized and existing. Plaintiff does not know the true name of the defendants sued as White Company, a fictitious corporation, or the Black Co., a fictitious partnership, and will ask leave to insert the same herein when ascertained.

V.

Plaintiff is informed and believes and upon that ground alleges that the defendants hereinabove named have been, and still are engaged in the manufacture, importation, exportation and sale of alcoholic beverages and within the State of California have so engaged, and are licensed to engage, under a distilled spirits importer's license as the same is defined in the Alcoholic Beverage Control Act (Statutes of 1935, page 1123, as amended; Business and Professional Code, Division 9) and by virtue of such license are lawfully authorized to exercise the privileges thereof and no others within the said State; that defendants are not authorized by said license to enter into, or conduct, or participate in, any transaction respecting alcoholic beverages and, more particularly, a sale thereof as defined in said Act with persons licensed to sell alcoholic beverages at retail to unlicensed persons, or with unlicensed persons.

VI.

Plaintiff is informed and believes and upon such ground alleges that at all times herein mentioned, and pursuant to the license hereinabove specified, the defendants were engaged in the importation and sale within the State of California certain distilled spirit products including but not limited to products bearing the labels and designation of "Lord Calvert", "Calvert Reserve", "Calvert Distilled London Dry Gin" and "Carstairs White Seal"; that all said products are prepared and

sold in containers bearing labels and sold under trade-marks and known by the trade names owned and controlled by the defendants, and are not available from any other source; and that the said products have been advertised and established in the minds of the purchasing public and have customer acceptance for that reason.

VII.

At all times herein mentioned the defendants have sold and distributed their said products within the State of California thru wholesale licensees designated or appointed by the said defendants as their respective distributors within a particular geographical area thereof, and have limited and restricted the sale of their said products to such wholesale licensees so designated or appointed. At all times herein mentioned the defendants have employed salesmen, sometimes known as "specialty men", and directed and required said salesmen to call upon the customers of its said distributors in purported support of the sale of defendants' products by such distributors to such customers; that the said salesmen have at such times solicited orders and sales, as defined in said Act, for defendants' products of and to persons other than those licensed in this State as wholesalers, manufacturers and rectifiers, and have submitted the orders so solicited and obtained to defendants' said distributors in such area for delivery thereof.

VIII.

For about ten years prior to March 1, 1952, plain-

tiff J. C. Millett Co. and its affiliates Key Distributing Co. and Monterey County Liquor Co. were engaged in the wholesale distribution of defendants' said products within several counties in the northern section of the State of California pursuant to an oral agreement then existing between plaintiff and defendants. Prior to March 1, 1952, defendants purported to repudiate said oral agreement and assert the right to unilaterally terminate the same without plaintiff's consent and without lawful cause. Plaintiff and its Affiliates refused to accede to such purported repudiation of the said agreement and asserted that the defendants were without right to unilaterally terminate the same without lawful cause. Thereafter, and prior to March 1, 1952, plaintiff and defendants entered into negotiations for the resolution of their respective rights and duties under the said agreement. Thereafter plaintiff and defendants agreed to the resolution of their respective rights and duties under said agreement by, and in consideration of the execution of a certain written agreement hereinafter referred to as the "written agreement", dated March 14th, 1952, copy whereof is annexed hereto marked "Exhibit 1" and incorporated herein by this reference as fully as if the same were set out verbatim and at length herein;

IX.

One of the conditions of the said written agreement was that the defendants agreed to promote the sale of its products by continuing to employ

salesmen sometimes known as "specialty men" within the counties of Alameda and Contra Costa in the manner and for the purpose specified in the preceding paragraph VII hereof, and submit the orders so solicited and obtained within the said two counties to the Key Distributing Co. for delivery. On and after March 14th 1952, when the said written agreement was executed between the parties hereto, the defendants did continue to employ such salesmen, and said salesmen continued to solicit and obtain orders in purported support of the sales of defendants' products, but failed, neglected and refused to submit all such orders to the Key Distributing Co. for delivery, but submitted a substantial portion thereof to other competing wholesale distributors of defendants in the said two counties for delivery.

X.

By reason of the facts hereinabove stated and particularly by reason of the failure, neglect and refusal by defendants to submit to the Key Distributing Co. orders solicited and obtained by the salesmen of defendants within the Counties of Alameda and Contra Costa for delivery according to the terms of said implied conditions of said agreement, the plaintiff has been damaged in an amount estimated at \$25,000.00.

For a second, further and separate cause of action against the same defendants plaintiff complains and alleges:

I.

Plaintiff repeats and re-alleges each and all the allegations contained in paragraphs I, II, III, IV, V, VI, VII and VIII of the preceding First Cause of Action hereof as respective allegations in this, the Second Cause of Action hereof, as fully as if set out in full herein.

II.

On December 15, 1952, while the said agreement dated March 14th 1952 was still in full force and effect, and pursuant to and in accordance with the terms thereof, the Key Distributing Co. executed and delivered to the defendants a written purchase order requesting shipment of nine hundred (900) cases of various sizes of the products of the defendants. Copy of said purchase order is attached hereto marked "Exhibit 2" and incorporated herein by this reference.

III.

The defendants failed, neglected and refused to ship and deliver to the Key Distributing Co. the said nine hundred (900) cases of products or any portion thereof without lawful reason therefor, and by reason of such failure, neglect and refusal on the part of the defendants, plaintiff has been damaged in an amount estimated at \$25,000.00.

For a Third, further and separate cause of action against the same defendants, plaintiff complains and alleges:

I.

Plaintiff repeats and re-alleges each and all the

allegations contained in paragraphs I, II, III, IV, V, VI, VII and VIII of the preceding First Cause of Action hereof as respective allegations in this, the Third Cause of Action hereof, as fully as if set out in full herein.

II.

In accordance with the terms and conditions of said written agreement of March 14, 1952 the Key Distributing Co. has at all times during the period commencing March 1st 1952 and ending December 31, 1952 used its best efforts to promote the sale of defendants' said products, maintained a sales force and selling and storage facilities therefor and an inventory of defendants' products sufficient to meet the demand therefor in said counties of Alameda and Contra Costa, devoted at least 23% of its time, sales effort and advertising expenditures in said counties toward the sale of defendants' said products therein, and purchased under and upon the terms and conditions of said agreement all of the defendants' said products it was able to resell in said counties at the prices determined by defendants therefor from time to time, and the said Key Distributing Co. at all said times duly and in good faith performed all the terms and conditions of the said agreement of distributorship on its part to be performed.

III.

The written agreement between the parties hereto dated March 14, 1952 and hereinabove referred to included a provision therein reading as follows:

11. This contract shall be effective for a period of ten months, from March 1, 1952. If distributor desires to renew the contract, he shall so notify Calvert not less than 30 days before December 31st 1952.

The foregoing provisions of the said agreement was intended by the parties thereto to mean, and was interpreted by the plaintiff to mean that in the event the said agreement was then in full force and effect and the Key Distributing Co. desired to renew and extend the said agreement, it had the sole and exclusive option to so extend and renew the same upon giving defendants not less than 30 days' notice of such intention prior to December 31, 1952.

IV.

On November 18, 1952, and while the said agreement was still in full force and effect, the Key Distributing Co. elected to renew the said contract, and pursuant to the provisions of par. 11 thereof which is fully set out hereinabove, the said Key Distributing Co. gave notice to the defendants of its election to exercise the said option and to renew the said agreement commencing with its expiration date on December 31, 1952. Copy of the said notice is attached hereto marked "Exhibit 3" and incorporated herein by this reference as fully as if set out in full herein.

V.

Thereafter, and on January 26, 1953, the defendants thru their attorney Frederick J. Lind advised plaintiff wrongfully, and without the fault of, or

default by, the Key Distributing Co. in the performance of said agreement, that the said agreement was terminated and ended as of December 31, 1952, and would not be renewed or extended notwithstanding the previous notice given by the Key Distributing Co. to the defendants notifying the defendants that the said Key Distributing Co. had elected to renew the said agreement in accordance with the terms thereof; and ever since then the defendants have failed, neglected and refused to give to and confer upon the Key Distributing Co. any of the benefits and privileges included in said agreement although the said Key Distributing Co. has at all times been ready, willing and able and has offered to perform in good faith all covenants and agreements on its part to be kept and performed under the terms of the said agreement and the requested renewal thereof.

VI.

By reason of the breach on the part of the defendants of the terms and conditions of the said agreement including the provisions of par. 11 thereof, plaintiff has been damaged in an amount estimated at \$100,000.00.

Therefore plaintiff prays for judgment against the defendants in the sum of \$25,000.00 upon the First Cause of Action hereof, in the further sum of \$25,000.00 upon the Second Cause of Action hereof, and in the sum of \$100,000.00 upon the Third Cause of Action hereof; for such other and further relief as in law or equity the facts may

require and the court may deem proper; and for costs and disbursements incurred in this action.

J. ALBERT HUTCHINSON and
LEON A. BLUM,
By J. ALBERT HUTCHINSON.

Duly Verified.

[Endorsed]: Filed August 25, 1954.

In the United States District Court, Northern
District of California, Southern Division

Civil Action No. 34034

J. C. MILLETT CO., a corporation, doing business
as KEY DISTRIBUTING CO., Plaintiff,

vs.

DISTILLERS DISTRIBUTING CORPORA-
TION, et al., Defendants.

ANSWER OF DEFENDANT DISTILLERS
DISTRIBUTING CORPORATION

Comes now defendant ("Defendant", as used herein, refers to Distillers Distributing Corporation, successor by merger to Calvert Distillers Corporation, and includes the latter), Distillers Distributing Corporation, substituted as a defendant herein in the place of Calvert Distillers Corporation, pursuant to stipulation of the parties and order of court, and severing from its co-defendants answers plaintiff's complaint as follows:

Answer to First Alleged Cause of Action

I.

Defendant admits the allegations of paragraphs I, II, and III of plaintiff's first alleged cause of action.

II.

Defendant admits the allegations of paragraph IV of plaintiff's first alleged cause of action insofar as they relate to this defendant.

III.

Defendant denies each and all of the allegations of paragraph V of plaintiff's first alleged cause of action insofar as they relate to this defendant, except defendant admits that it has been and still is engaged in the importation, exportation and sale of alcoholic beverages and within the State of California has so engaged and is licensed to so engage; and admits that its licenses in California do not authorize it to sell alcoholic beverages to persons licensed to sell alcoholic beverages at retail or to unlicensed persons.

IV.

Defendant denies each and all of the allegations of paragraph VI of plaintiff's first alleged cause of action insofar as they relate to this defendant, except defendant admits that at all times mentioned in plaintiff's complaint it was engaged in the importation and sale within the State of California of certain distilled spirit products including but not limited to products bearing the labels and designation of "Lord Calvert", "Calvert Reserve",

“Calvert Distilled London Dry Gin” and “Carstairs White Seal”.

V.

Answering paragraph VII of plaintiff's first alleged cause of action, defendant admits that at all times mentioned in plaintiff's complaint it has sold and distributed its products within the State of California through wholesale licensees designated or appointed by defendant as its respective distributors within a particular geographical area thereof, and has limited and restricted the sale of its products to such wholesale licensees so designated or appointed; admits that at all times mentioned in plaintiff's complaint it has employed salesmen, sometimes known as “specialty men”; defendant denies that it has directed and required said salesmen to call upon the customers of its distributors in purported support of the sale of its products by such distributors to such customers.

Further answering said paragraph VII, defendant denies each and all of the allegations therein contained, not hereinabove expressly admitted or specifically denied insofar as said allegations relate to this defendant.

VI.

Defendant denies each and all of the allegations of paragraph VIII of plaintiff's first alleged cause of action insofar as they relate to this defendant, except defendant admits that for about ten years prior to March 1, 1952, plaintiff J. C. Millett Co. and its affiliates, Key Distributing Co. and Monterey County Liquor Co., were engaged in the whole-

sale distribution of defendant's products within several counties in the northern section of the State of California.

VII.

Defendant denies each and all of the allegations of paragraph IX of plaintiff's first alleged cause of action insofar as they relate to this defendant.

VIII.

Defendant denies each and all of the allegations of paragraph X of plaintiff's first alleged cause of action insofar as they relate to this defendant; defendant denies that plaintiff has been damaged in the amount stated in said paragraph X, or in any sum, or otherwise or at all.

IX.

Except as hereinabove expressly admitted or denied, defendant denies each and all of the allegations of plaintiff's first alleged cause of action insofar as they relate to this defendant.

Defenses to First Alleged Cause of Action

I.

For a first, separate and distinct defense to plaintiff's first alleged cause of action, defendant says that the facts alleged in said first alleged cause of action are insufficient to state a claim upon which relief can be granted.

II.

For a second, separate and distinct defense to plaintiff's first alleged cause of action, defendant

alleges that if, as alleged in paragraph IX of plaintiff's first alleged cause of action, one of the conditions of the written agreement between the parties, dated March 14, 1952, was that this defendant agreed to promote the sale of its products by continuing to employ salesmen within the counties of Alameda and Contra Costa in the manner and for the purpose specified in paragraph VII of plaintiff's first alleged cause of action and submit the orders so solicited and obtained within the said two counties to Key Distributing Co. for delivery, said condition was and still is illegal, null and void, because it is and was at all times mentioned in plaintiff's complaint unlawful for the defendant under the licenses which it holds in the State of California to solicit or obtain orders for alcoholic beverages from persons licensed by the State of California to sell alcoholic beverages at retail and/or from unlicensed persons (Business and Professions Code of the State of California, secs. 23000 et seq.); that plaintiff at all times mentioned in plaintiff's complaint knew that it was unlawful for the defendant, within the State of California, to solicit or obtain orders for alcoholic beverages from persons licensed by the State of California to sell alcoholic beverages at retail and/or from unlicensed persons.

Answer to Second Alleged Cause of Action

I.

Answering paragraph I of plaintiff's second alleged cause of action, defendant repeats, realleges and makes a part hereof each and every admission,

denial, averment and allegation contained in paragraphs I, II, III, IV, V and VI of its answer to plaintiff's first alleged cause of action with the same force and effect as if repeated at length in this paragraph.

II.

Defendant admits the allegations of paragraph II of plaintiff's second alleged cause of action insofar as they relate to this defendant.

III.

Defendant denies each and all of the allegations of paragraph III of plaintiff's second alleged cause of action insofar as they relate to this defendant, except defendant admits that it did not ship and deliver to the Key Distributing Co. the said nine hundred cases of products or any portion thereof; defendant denies that plaintiff has been damaged in the amount stated in said paragraph III, or in any sum, or otherwise or at all.

IV.

Except as hereinabove expressly admitted or specifically denied, defendant denies each and all of the allegations of plaintiff's second alleged cause of action insofar as they relate to this defendant.

Defenses to Second Alleged Cause of Action

I.

For a first, separate and distinct defense to plaintiff's second alleged cause of action, defendant says that the facts alleged in said second alleged cause

of action are insufficient to state a claim upon which relief can be granted.

II.

For a second, separate and distinct defense to plaintiff's second alleged cause of action, defendant alleges that paragraph 5 of the agreement between the parties, dated March 14, 1952, Exhibit 1 to plaintiff's complaint, provided:

"5. Calvert agrees to supply its products to Distributor to the best of Calvert's ability, but it is understood and agreed that all or some products may not always be available to fill all orders and Calvert shall have the right to allocate to Distributor such proportion of the available supplies of its products as Calvert shall decide in its sole discretion. Calvert reserves the right not to ship any orders received where such orders would result in an inventory in the hands of Distributor greater than a 45-day inventory, based on the rate of sales of Calvert products by Distributor for the six months prior to the date of this contract.";

that defendant did not ship and deliver to Key Distributing Co. the merchandise listed in the written purchase order executed and delivered to defendant by Key Distributing Co. on December 15, 1952, because said order would have resulted in an inventory of defendant's products in the hands of Key Distributing Co. greater than a 45-day inventory, based on the rate of sales of defendant's products by Key Distributing Co. for the six

months prior to the date of the agreement between the parties, dated March 14, 1952.

III.

For a third, separate and distinct defense to plaintiff's second alleged cause of action, defendant alleges that the agreement between the parties, dated March 14, 1952, Exhibit 1 to plaintiff's complaint, terminated by its terms on December 31, 1952, and that said agreement was not renewed; that paragraph 12 of said agreement provided:

"12. In the event that this contract is not renewed, Distributor agrees that within 30 days after December 31, 1952, it will return to Calvert at its invoice price all of the Calvert merchandise remaining in its inventory.";

that the merchandise listed in the written purchase order executed and delivered to defendant by Key Distributing Co. on December 15, 1952, if shipped by defendant, would have arrived at the premises of Key Distributing Co. on or about the date the said agreement between the parties terminated; that it would have been an idle act for defendant to ship and deliver to Key Distributing Co. the merchandise specified in said written purchase order because, under the terms of paragraph 12 of the said agreement between the parties, Key Distributing Co. would have been obligated to return said merchandise to the defendant at its invoice price.

IV.

For a fourth separate and distinct defense to

plaintiff's second alleged cause of action, defendant alleges that, if as alleged in paragraph IX of plaintiff's first alleged cause of action, one of the conditions of the written agreement between the parties dated March 14, 1952, was that this defendant agreed to promote the sale of its products by continuing to employ salesmen within the counties of Alameda and Contra Costa in the manner and for the purpose specified in paragraph VII of plaintiff's first alleged cause of action and submit the orders so solicited to Key Distributing Co. for delivery, defendant avers that said written agreement was at all times mentioned in plaintiff's second alleged cause of action and still is illegal, null and void because it is and at all times mentioned in plaintiff's complaint was unlawful for the defendant under the licenses which it holds in the State of California to solicit or obtain orders for alcoholic beverages from persons licensed by the State of California to sell alcoholic beverages at retail and/or from unlicensed persons; that plaintiff at all times mentioned in plaintiff's complaint, knew that it was unlawful for the defendant, within the State of California, to solicit or obtain orders for alcoholic beverages from persons licensed by the State of California to sell alcoholic beverages at retail and/or unlicensed persons.

V.

For a fifth separate and partial defense to plaintiff's second alleged cause of action and in mitigation of any damages to which the plaintiff may be,

or may appear to be, entitled to by reason of the alleged acts of defendant, as set forth in plaintiff's second alleged cause of action herein, defendant alleges that on February 19, 1953, Key Distributing Co. returned to defendant and received credit from defendant for seven hundred and forty-eight (748) cases and two hundred and six (206) bottles of defendant's products.

Answer to Third Alleged Cause of Action

I.

Answering paragraph I of plaintiff's third alleged cause of action, defendant repeats, realleges and makes a part hereof each and every admission, denial, averment and allegations contained in paragraphs I, II, III, IV, V, and VI of its answer to the plaintiff's first alleged cause of action with the same force and effect as if repeated at length in this paragraph.

II.

Answering paragraph II of plaintiff's third alleged cause of action, defendant denies it has any knowledge of information sufficient to form a belief as to the truth of any of the allegations contained in said paragraph II.

III.

Answering paragraph III of plaintiff's third alleged cause of action, defendant admits that the written agreement between the parties, dated March 14, 1952, included the provision set forth in said paragraph III; defendant denies that said provi-

sion was intended by the parties to mean that in the event the said agreement was then in full force and effect and the Key Distributing Co. desired to renew and extend the said agreement, it had the sole and exclusive option to so extend and renew the same upon giving defendant not less than thirty (30) days' notice of such intention prior to December 31, 1952; defendant admits that the said provision was interpreted by plaintiff to mean that in the event the said agreement was then in full force and effect and the Key Distributing Co. desired to renew and extend the said agreement, it had the sole and exclusive option to so extend and renew the same upon giving defendant not less than thirty (30) days' notice of such intention prior to December 31, 1952; defendant avers that it did not and does not agree with said interpretation; that said provision did not confer upon plaintiff the right to renew the said agreement; and that said agreement has not been renewed by defendant.

IV.

Answering paragraph IV of plaintiff's third alleged cause of action, defendant denies each and all of the allegations of said paragraph, except defendant admits it received the letter attached to the complaint as "Exhibit 3" while the agreement of March 14, 1952 was still in full force and effect; defendant denies that under the terms and provisions of the agreement between the parties, dated March 14, 1952, plaintiff had the right to elect to renew said agreement; defendant denies that under

the terms and provisions of said agreement plaintiff had the right to renew said agreement.

V.

Answering paragraph V of plaintiff's third alleged cause of action, commencing with the word "thereafter", on page 7, line 14, to and including the word "thereof", on page 7, line 21, defendant denies each and every allegation therein contained; defendant admits that it has not renewed the agreement between the parties, dated March 14, 1952; defendant denies it has any knowledge or information sufficient to form a belief as to the truth of the allegation "the said Key Distributing Co. has at all times been ready, willing and able and has offered to perform in good faith all covenants and agreements on its part to be kept and performed under the terms of the said agreement and the requested renewal thereof".

VI.

Defendant denies each and all of the allegations of paragraph VI of plaintiff's third cause of action; defendant denies that plaintiff has been damaged in the amount stated in said paragraph VI, or in any sum, or otherwise, or at all.

VII.

Except as hereinabove expressly admitted or specifically denied, defendant denies each and all of the allegations of plaintiff's third alleged cause of action insofar as they relate to this defendant.

Defenses to Third Alleged Cause of Action

I.

For a first, separate and distinct defense to plaintiff's third alleged cause of action, defendant says that the facts alleged in said third alleged cause of action are insufficient to state a claim upon which relief can be granted.

II.

For a second, separate and distinct defense to plaintiff's third alleged cause of action, defendant alleges that the written agreement between the parties, dated March 14, 1952, Exhibit 1 to the complaint, included a provision reading as follows:

“11. This contract shall be effective for a period of ten months, from March 1, 1952. If distributor desires to renew the contract, he shall so notify Calvert not less than 30 days before December 31st, 1952”;

that said provision was intended by the parties to mean that in the event the agreement was then in full force and effect and the Key Distributing Co. desired to renew said agreement, it was to apply for said renewal by giving notice to defendant of its desire to renew not less than thirty (30) days prior to December 31, 1952, and that thereafter the defendant had the right to accept or reject said application for renewal; that said provision did not confer and was not intended by the parties to confer upon plaintiff the right to renew said agreement; that said agreement has not been renewed

by defendant; that said agreement terminated on December 31, 1952.

III.

For a third separate and distinct defense to plaintiff's third alleged cause of action defendant alleges that if as alleged in paragraph IX of plaintiff's first alleged cause of action one of the conditions of the written agreement between the parties dated March 14, 1952, was that this defendant agreed to promote the sale of its products by continuing to employ salesmen within the counties of Alameda and Contra Costa in the manner and for the purpose specified in paragraph VII of plaintiff's first alleged cause of action and submit the orders so solicited to Key Distributing Co. for delivery, defendant avers that said written agreement was at all times mentioned in plaintiff's third alleged cause of action and still is illegal, null and void because it is and at all times mentioned in plaintiff's complaint was unlawful for the defendant under the licenses which it holds in the State of California to solicit or obtain orders for alcoholic beverages from persons licensed by the State of California to sell alcoholic beverages at retail and/or from unlicensed persons; that plaintiff at all times mentioned in plaintiff's complaint knew that it was unlawful for the defendant, within the State of California, to solicit or obtain orders for alcoholic beverages from persons licensed by the State of California to sell alcoholic beverages at retail and/or from unlicensed persons.

Wherefore, defendant prays judgment that plaintiff take nothing by its complaint on file herein, and that defendant have and recover its costs of suit herein incurred.

PHILIP S. EHRLICH,
ALBERT A. AXELROD,
IRVING ROVENS,

Attorneys for Defendant, Distillers
Distributing Corporation.

[Endorsed]: Filed May 19, 1955.

[Title of District Court and Cause.]

INTERROGATORIES PROPOUNDED TO
PLAINTIFF BY DEFENDANT DISTILLERS
DISTRIBUTING CORPORATION

* * * * *

Interrogatory 4.

List the inventory of Calvert products that plaintiff had on hand on December 15, 1952, December 31, 1952 and January 31, 1953.

[See Answer at pages 94-95.]

* * * * *

[Endorsed]: Filed June 10, 1955.

[Title of District Court and Cause.]

INTERROGATORIES PROPOUNDED TO
DEFENDANT

* * * * *

14. State the names and business or residence addresses of each officer, agent and employee of defendant, and any successor in interest, Calvert Distilling Co., hereinafter called Calvert, and Carstairs Bros. Distilling Co., Inc., hereinafter called Carstairs, designated and authorized to call upon persons licensed to engage in the purchase and resale to unlicensed persons of alcoholic beverages, hereinafter called retailers, within the Counties of Alameda and Contra Costa, State of California, for the period of January 1, 1952, to date, for the purpose of advertising, promoting, selling, soliciting orders or negotiating sales of products of each of said corporations, in this interrogatory referred to, to such persons so licensed in said counties.

[See Answer at pages 104-105.]

15. State the directions, policy and practice of each of said corporations referred to in interrogatory 14 with regard to the solicitation, negotiation or initiation by officers, agents and employees of such corporations of sales, orders for the purchase and proposals to purchase of retailers of products of such corporations in said counties for the period of January 1, 1952, to date and, if any be evidenced by any writing, the location and identity of the custodians of such writing or writings.

[See Answer at page 105.]

* * * * *

19. Identify and give the designation for each type or kind of report such sales representatives of each of said corporations referred to in interrogatory 14 make, and have made, to distributors indicating a proposal to purchase, or offer or willingness to buy, products of said corporations by or on behalf of a retailer, and identify each such report referring to the same made or delivered, during the period of January 1, 1952, to date, to (a) plaintiff and (b) other distributors or other persons named in interrogatory 18 hereof; and state the location of such reports and identify, by name, position and address, the present custodian of each such report.

[See Answer at page 105.]

* * * * *

21. State:

(a) the facts on which defendant relies in the asserted first special defense to plaintiff's second cause of action as justifying defendant's failure to deliver merchandise listed in the order dated December 15, 1952, and particularly that portion reading:

“because said order would have resulted in an inventory of defendant's products in the hands of Key Distributing Co. greater than a 45-day inventory, based on the rate of sales of defendant's products by Key Distributing Co. for the six months prior to the date of the agreement between the parties, dated March 14, 1952.”

(b) the inventories respecting the six months

prior to December 15, 1952, referred to on which defendant relies, and identifying therein quantities of each product identified in the order referred to;

[See Answers at page 100.]

* * * * *

[Endorsed]: Filed April 5, 1956.

[Title of District Court and Cause.]

AMENDMENT TO COMPLAINT TO CONFORM TO PROOF

First Cause of Action

VII.

At all times herein mentioned the defendants have sold and distributed their said products within the State of California thru wholesale licensees designated or appointed by the said defendants as their respective distributors within a particular geographical area thereof, and have limited and restricted the sale of their said products to such wholesale licensees as designated or appointed. At all times herein mentioned the defendants have employed employees, sometimes designated as "specialty men", and directed and required its said specialty men to call upon the customers of its said distributors for the purpose of promoting the sales of its products and advertising its products to such customers and to aid said distributors in selling the defendants' products to such customers.

VIII.

For about ten years prior to March 1, 1952, plain-

tiff J. C. Millett Co. and its affiliates Key Distributing Co. and Monterey County Liquor Co. were engaged in the wholesale distribution of defendants' said products within several counties in the northern section of the State of California pursuant to an oral agreement then existing between plaintiff and defendants. Prior to March 1, 1952, defendants purported to repudiate said oral agreement and to assert the right to unilaterally terminate the same without plaintiff's consent and without lawful cause. Plaintiff and its said affiliates refused to accede to such purported repudiation of the said agreement and asserted that the defendants were without right to unilaterally terminate the same without lawful cause. Thereafter, and prior to March 1, 1952, plaintiff and defendants entered into negotiations for the resolution of their respective rights and duties under their said agreement. Thereafter plaintiff and defendants agreed to the resolution of their respective rights and duties under said oral agreement by, and in consideration of the execution of a certain written agreement hereinafter referred to as the "written agreement", dated March 14, 1952, copy whereof is annexed hereto marked "Exhibit 1" and incorporated herein by this reference as fully as if the same were set out verbatim and at length herein.

IX.

One of the provisions of the said written agreement, in paragraph 6 thereof, specified as follows:

"Calvert agrees to promote the sales of its

products and to advertise its products in a manner consistent with the type of merchandise and the cases sold * * *”

Said provision was intended to, and did operate for the joint benefit of plaintiff and defendants in this, that it enabled plaintiff to make a substantial number of sales of defendants' products to plaintiff's customers. Pursuant to the said provision defendants did maintain such specialty men to promote sales and advertise its products in the counties of Alameda and Contra Costa wherein the said written agreement was operative, for the joint benefit of plaintiff and defendants, until on or about July 1, 1952. On said last named date, while the said written agreement was still in full force and effect, and without cause *of* provocation on the part of plaintiff, the defendants ceased and discontinued said promotion and advertising of its products for the joint benefit of plaintiff and defendants, but continued such promotion and advertising for the benefit of defendants and plaintiff's business competitors in said area, at the exclusion of plaintiff and in express violation of the terms of the said written agreement.

X.

By reason of the facts hereinabove stated, and particularly by reason of the fact that on or about July 1, 1952 and for the remainder of the term of the said written agreement the defendants ceased and failed to continue its said promotion of sales and advertising for the joint benefit of plaintiff

and defendants and excluded plaintiff from the benefits to be derived therefrom, the plaintiff has been damaged in an amount estimated at \$25,000.00.

Dated: January 17, 1957.

J. ALBERT HUTCHINSON and
LEON A. BLUM,
/s/ By LEON A. BLUM,
Attorneys for Plaintiff.

[Endorsed]: Filed January 17, 1957.

[Title of District Court and Cause.]

MOTIONS TO DISMISS

Defendant in the above-entitled action moves the Court as follows:

1. To dismiss the complaint and each cause of action thereof upon the ground that the contract sued upon is illegal, null and void inasmuch as it contains a provision requiring defendant to perform an obligation which violates the Constitution of the State of California, the Alcoholic Beverage Control Act of the State of California and the public policy of the State of California.

2. To dismiss the first cause of action of plaintiff's complaint upon the ground that it fails to state a claim upon which relief can be granted because evidence of an alleged undertaking by defendant to promote the sale of its products in plaintiff's territory by continuing to employ salesmen therein for the purpose of soliciting orders

and submitting them to the plaintiff for delivery is not admissible. To admit such evidence would violate paragraph 16 of the contract which provides:

“This agreement represents the entire agreement between the parties and cannot be modified except in writing duly executed by both parties,”

and the parol evidence rule which has been codified in California in sections 1638 and 1639 of the Civil Code and section 1856 of the Code of Civil Procedure.

3. To dismiss the third cause of action of plaintiff's complaint upon the ground that it fails to state a claim upon which relief can be granted because paragraph 11 of the contract sued upon is unambiguous and gave plaintiff no right to renew or option to renew the contract.

4. To dismiss the complaint and each cause of action thereof under the provisions of Rule 41(b) of the Federal Rules of Civil Procedure on the ground that upon the facts and the law the plaintiff has shown no right to relief.

Dated: January 17, 1957.

PHILIP S. EHRLICH,
ALBERT A. AXELROD,
IRVING ROVENS,

Attorneys for Defendant Distillers
Distributing Corporation.

[Endorsed]: Filed January 17, 1957.

[Title of District Court and Cause.]

PLAINTIFF'S OBJECTIONS TO PROPOSED
FINDINGS OF FACT, CONCLUSIONS OF
LAW AND JUDGMENT

Plaintiff objects to proposed Findings of Fact and Conclusions of Law and Judgment proposed by defendant, and served upon plaintiff on the 21st day of January, 1957, as to both form and substance, in the particulars and upon the grounds following, namely:

I.

The proposals, individually and collectively, are neither (1) responsive to, nor (2) supported by, the record in this cause;

II.

The proposals are, and each of them is, contrary to the evidence received and the admissions of defendant herein;

III.

The proposals are, and each of them is, contrary to law;

IV.

The proposed findings are contrary to the evidence received and the admissions of defendant in the cause, in general and collectively, and in the following particulars, to wit:

1. Proposed findings, paragraph IV, relating to paragraph IX of the first cause of action, in that, First, the contract imposes upon defendant the obligation of promoting Calvert and Carstairs prod-

ucts in plaintiff's behalf and it is proved that such promotional support was affirmatively withdrawn by defendant in relation to plaintiff's rights and functions under the contract, and, Secondly, plaintiff regularly and timely moved for leave of Court to amend its complaint in this particular to conform to the proof received by the Court upon this subject matter, which motion is hereby expressly renewed and made anew upon the grounds and for the reasons heretofore stated and appearing in the record herein;

2. Proposed findings, paragraphs VIII and IX, relating to the second cause of action, in that, First, there is no pleading and no evidence of any so-called "lawful reasons for not shipping" the merchandise timely and duly ordered "pursuant to and in accordance with the terms" of the contract as alleged in paragraph II of the second cause of action and expressly admitted in paragraph II of defendant's answer to plaintiff's second cause of action; Secondly, the facts averred in paragraph II of defendant's second and separate defense to plaintiff's second cause of action are (1) contrary to the evidence and to the admissions of defendant and (2) insufficient in fact and law to constitute any defense to plaintiff's second cause of action, or any excuse for failure to perform paragraph 5 of the contract; and, Thirdly, the only purported evidence received in relation to this subject matter, in the form of plaintiff's answers to defendant's interrogatory numbered IV fails to indicate (1) that plaintiff's order was rejected, or rejected by

reason of paragraph 5 of the contract or by reason of plaintiff's inventory, or at all, or (2) that defendant's failure to deliver the ordered merchandise was based upon, or occasioned by, plaintiff's supposed inventory, or that existing inventories were balanced for purposes of resale in the usual course of plaintiff's business, or any of the same;

3. Proposed findings, paragraph XI, relating to the third cause of action, in that, First, it is admitted by defendant in paragraph III of its answer to the third cause of action that paragraph 11 of the contract interpreted by plaintiff as conferring upon it an option to renew the contract; and, Secondly, the purported findings is without evidentiary support other than said admission and the contractual document itself and the purported finding thereon is merely an erroneous conclusion of law upon the admitted facts;

4. Proposed findings, paragraph XII, relating to damages, is, First, contrary to the evidence and controlling substantive presumptions of law, and, Secondly, contrary to the stipulations of the parties and the rulings of the Court that damages shall be assumed and reserved for all purposes of decision upon the issues and questions related to defendant's liability as submitted to the Court for ruling and decision;

V.

The proposed conclusions of law and proposed judgment are, First, contrary to issues, admissions of defendant and the evidence received in the cause; Secondly, contrary to law in that none of the same

respond, conform or apply to the record in the cause; and, Thirdly, contrary to, and fail to apply, to the record in the cause, the controlling statutes, common law principles and rules of decision of the State of California, upon the questions of substantive law invoked by the pleadings and the evidence, as provided by law, as expressly stipulated in paragraph 15 of the contract between the parties in issue, or otherwise.

Wherefore, plaintiff respectfully requests that (1) each of the proposed findings hereinbefore particularly identified, namely: Numbers IV, VII, IX, XI and XII, and, (2) the proposed conclusions and the proposed judgment be stricken from the record and that the Court make and enter its findings, conclusions and judgment in accordance with the pleadings and evidence and in conformity to the substantive law of the State of California.

Respectfully submitted January 24, 1957.

J. ALBERT HUTCHINSON,
LEON A. BLUM,

/s/ By J. ALBERT HUTCHINSON,
Attorneys for Plaintiff.

[Endorsed]: Filed January 30, 1957.

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above-entitled cause came on regularly for trial on the 16th and 17th days of January, 1957,

before the Court sitting without a jury, J. Albert Hutchinson, Esq., and Leon A. Blum, Esq., appearing as counsel for the plaintiff, and Philip S. Ehrlich, Esq., and Irving Rovens, Esq., appearing as counsel for defendant, and the Court having heard the testimony and having examined the proofs offered by the respective parties, and the cause having been submitted to the Court for decision, and the Court being fully advised in the premises now makes its findings of fact as follows:

Findings of Fact

I.

That it is true that after the commencement of this action the present defendant, Distillers Distributing Corporation, was substituted as a defendant herein in the place of Calvert Distillers Corporation.

II.

That it is true that this action involves a controversy which is wholly between citizens of different states and that the matter in controversy exceeds the sum of \$3,000 exclusive of interest and costs.

III.

That it is true that on March 14, 1952, plaintiff and Calvert Distillers Corporation entered into a written agreement which is attached as "Exhibit 1" to plaintiff's complaint.

IV.

That the allegations contained in paragraph IX of the first cause of action of plaintiff's complaint are, and each of them is, untrue.

V.

That the allegations contained in paragraph II of defendant's second, separate and distinct defense to plaintiff's first cause of action are, and each of them is, true.

VI.

That it is true that on December 15, 1952, plaintiff executed and delivered to Calvert Distillers Corporation a written purchase order requesting shipment of 900 cases of various sizes of the products of Calvert Distillers Corporation.

VII.

That it is true that Calvert Distillers Corporation did not ship and deliver to the plaintiff the 900 cases of products ordered by plaintiff on December 15, 1952.

VIII.

That it is untrue that Calvert Distillers Corporation did not have a lawful reason for not shipping to plaintiff the products requested in its order dated December 15, 1952.

IX.

That the allegations contained in paragraph II of defendant's second, separate and distinct defense to plaintiff's second alleged cause of action are, and each of them is, true.

X.

That it is true that paragraph 11 of the contract between Calvert Distillers Corporation and plaintiff dated March 14, 1952, provided:

"This contract shall be effective for a period

of ten months, from March 1, 1952. If distributor desires to renew the contract, he shall so notify Calvert not less than 30 days before December 31, 1952.”

XI.

It is untrue that the provisions of paragraph 11 of the contract between Calvert Distillers Corporation and plaintiff dated March 14, 1952, were intended by the parties to mean that in the event the said agreement was then in full force and effect and Key Distributing Co. desired to renew the said agreement, it had the sole and exclusive option to so extend and renew the same upon giving Calvert Distillers Corporation not less than 30 days' notice of such intention prior to December 31, 1952.

XII.

That it is not true that plaintiff has been damaged in the sums alleged in plaintiff's complaint, or in any other sums, by reason of any acts or conduct on the part of Calvert Distillers Corporation and/or of its agents, servants or employees.

From the foregoing facts, the Court concludes as follows:

Conclusions of Law

I.

The contract made and entered into by Calvert Distillers Corporation and plaintiff on March 14, 1952, and attached to plaintiff's complaint as "Exhibit 1" was not breached by Calvert Distillers Corporation in any respect.

II.

The contract between Calvert Distillers Corporation and plaintiff dated March 14, 1952, terminated by its terms on December 31, 1952.

III.

The provisions of paragraph 11 of the contract between Calvert Distillers Corporation and plaintiff dated March 14, 1952, did not give plaintiff an option to renew said contract.

IV.

The contract pleaded in plaintiff's complaint and relied upon by plaintiff in this action was and is illegal, null and void.

V.

Plaintiff is entitled to take nothing by reason of its complaint against defendant and that defendant have judgment for its costs of suit herein incurred.

Let Judgment be entered accordingly.

Dated: January 31st, 1957.

/s/ MICHAEL J. ROCHE,

Judge of the United States District
Court.

Acknowledgment of Service Attached.

[Endorsed]: Filed January 31, 1957.

In the United States District Court, Northern
District of California, Southern Division

Civil Action No. 34034

J. C. MILLETT CO., a corporation, doing business
as KEY DISTRIBUTING CO., Plaintiff,

vs.

DISTILLERS DISTRIBUTING CORPORA-
TION, et al., Defendants.

JUDGMENT

The above-entitled cause came on regularly for trial on the 16th and 17th days of January, 1957, before the Court sitting without a jury, J. Albert Hutchinson, Esq., and Leon A. Blum, Esq., appearing as counsel for the plaintiff, and Philip S. Ehrlich, Esq., and Irving Rovens, Esq., appearing as counsel for defendant, Distillers Distributing Corporation, and was duly submitted for consideration and decision, and the Court after due deliberation rendered its decision and on the 31st day of January, 1957, made and filed its findings of fact, conclusions of law and order for judgment.

Now, Therefore, pursuant thereto, It Is Ordered and Adjudged that plaintiff take nothing by its action and that defendant have judgment for its costs and disbursements herein expended, to be hereinafter taxed, on notice, and hereinafter inserted by the Clerk of this Court in the sum of \$.....

Done in open Court this 31st day of January, 1957.

/s/ MICHAEL J. ROCHE,
Judge of the United States District
Court.

Entered in Civil Docket January 31, 1957.

[Endorsed]: Filed January 31, 1957.

[Title of District Court and Cause.]

NOTICE OF APPEAL

To the Clerk of the Above-Entitled Court:

To the Defendant Above Named and to Messrs.
Philip S. Ehrlich and Irving Rovens, its At-
torneys:

You and Each of You Will Please Take Notice that plaintiff intends to, and it does hereby, appeal to the United States Court of Appeals for the Ninth Circuit, from that certain judgment and those certain findings of fact and conclusions of law in the above-entitled proceeding, in favor of defendant and against plaintiff, and made and entered in the above-entitled Court the 31st day of January, 1957, and from each and the whole thereof.

Dated this 6th day of February, 1957.

LEON A. BLUM and
J. ALBERT HUTCHINSON,
/s/ By J. ALBERT HUTCHINSON,
Attorneys for Plaintiff.

[Endorsed]: Filed February 7, 1957.

[Title of District Court and Cause.]

APPELLANT'S STATEMENT OF POINTS
AND DESIGNATION OF RECORD

To the Clerk of the Above-Entitled Court:

Pursuant to Rule 17, Rules of Practice of the United States Court of Appeals for the Ninth Circuit, appellant respectfully submits herewith its statement of points on which appellant intends to rely in the above-captioned appeal and upon its designation of the portions of the record material to the consideration of the appeal.

Statement of Points to Be Relied Upon

Points upon which appellant intends to rely may be concisely stated as follows:

1. The evidence in the cause is insufficient to justify the findings and judgment, particularly including, but not limited to the findings numbered IV, VIII, IX, XI, and XII.

2. The judgment and findings are contrary to the evidence, particularly including, but not limited to, the findings numbered IV, VIII, IX, XI and XII.

3. The judgment and each of the conclusions of law numbered I, II, III, IV and V are contrary to law and outside the issues presented by the pleadings of the parties to the cause.

4. The appellant was prevented from having a fair trial, and was materially prejudiced by the failure of the trial court to sustain appellant's objections to the proposed findings of fact and conclusions of law proposed by appellee.

5. The appellant was prevented from having a fair trial, and was materially prejudiced by the sustaining of appellee's objections to appellant's motion to amend its complaint to conform to the proof in the cause and by the denial of leave to file such amended complaint.

6. The appellant was prevented from having a fair trial, and was materially prejudiced by the excluding of appellant's interrogatories to appellee and appellee's answers thereto, excluding the same as evidence in the cause.

7. The appellant was prevented from having a fair trial, and was materially prejudiced by the sustaining of appellee's objections to testimony relating to the interpretation of the contract set forth in the complaint, excluding the same as evidence in the cause.

Designation of Material Portions to the Record on Appeal

Appellant hereby designates the material portions of the record on appeal on which appellant intends to rely, namely:

1. Appellant's complaint, pages 1 through 8, excluding jurat;

2. Appellee's answer to appellant's complaint, pages 1 through 12;

3. Appellant's amendment to complaint to conform to the proof, pages 1 through 3;

4. Appellee's motion to dismiss, filed January 17, 1957;

5. Appellant's objections to findings of fact and conclusions of law *in judgment* proposed by appellee;

6. Notice of appeal;

7. Judgment;

8. Appellant's designation of record on appeal;

9. Interrogatories propounded by appellant to appellee, numbered XIV, XV and XIX.

10. Answers of appellee to appellant's interrogatories, numbered XIV, XV and XIX, in part, as quoted in reporter's typewritten transcript, pages 68 and 69;

11. Documentary evidence received and offered and rejected, identified as plaintiff's exhibits I, II, III and IV;

12. Reporter's transcript of oral proceedings, as follows:

a. Page 3, Line 1 through Page 11, Line 9;

b. Page 23, Line 16 through Page 24, Line 14;

c. Page 33, Line 23 through Page 35, Line 12;

d. Page 39, Line 6, through Page 40, Line 2;

e. Page 41, Line 14 through Page 118, Line 9;

f. Page 124, Line 4 through Page 126, Line 11;

g. Page 134, Line 12 through Page 144, Line 12.

Respectfully submitted,

LEON A. BLUM and

J. ALBERT HUTCHINSON,

/s/ By J. ALBERT HUTCHINSON,

Attorneys for Appellant.

Acknowledgment of Service Attached.

[Endorsed]: Filed March 19, 1957.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK TO RECORD
ON APPEAL

I, C. W. Calbreath, Clerk of the United States District Court for the Northern District of California, hereby certify the foregoing and accompanying documents and exhibits, listed below, are the originals filed in this Court in the above-entitled case and constitute the record on appeal herein as designated by the attorneys for the appellant:

Excerpt from Docket Entries.

Transcript on Removal from Superior Court of San Francisco.

Answer of Distillers Distributing Corporation.

Interrogatories by Defendant to Plaintiff.

Answer of Plaintiff to Interrogatories.

Interrogatories by Plaintiff to Defendant.

Answer of Defendant to Interrogatories.

Amendment to Complaint to Conform to Proof.

Motion of Defendant to Dismiss.

Findings of Fact and Conclusions of Law.

Objections of Plaintiff to Proposed Findings and Conclusions.

Judgment.

Notice of Appeal.

Appeal Bond.

Appellant's Designation of Record on Appeal.

Reporter's transcript of proceedings January 16, 17 and 25, 1957.

Plaintiff's Exhibits 1, 2, 3 and 4.

Defendant's Exhibits A and B.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court this 9th day of March, 1957.

[Seal] C. W. CALBREATH,
Clerk,

/s/ By MARGARET P. BLAIR,
Deputy Clerk.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK TO SUPPLEMENTAL RECORD ON APPEAL

I, C. W. Calbreath, Clerk of the United States District Court for the Northern District of California, hereby certify the foregoing and accompanying document, listed below, is the original filed in this Court in the above-entitled case and constitutes the supplemental record on appeal herein:

Appellant's Statement of Points and Designation of Record.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court this 1st day of April, 1957.

[Seal] C. W. CALBREATH,
Clerk,

/s/ By MARGARET P. BLAIR,
Deputy Clerk.

In the United States District Court, Northern
District of California, Southern Division

No. 34,034

J. C. MILLETT CO., a corporation, doing business
as KEY DISTRIBUTING CO., Plaintiff,

vs.

DISTILLERS DISTRIBUTING CORPORA-
TION, et al., Defendants.

TRANSCRIPT OF PROCEEDINGS

January 16, 1957

Before: Hon. Michael J. Roche, Judge.

Appearances: For the Plaintiff: J. Albert Hut-
chinson, Esq., Leon A. Blum, Esq. For the Defend-
ants: Philip S. Ehrlich, Esq., Irving Rovens,
Esq. [1]*

The Clerk: J. C. Millett vs. Distillers Distribut-
ing Corporation, on trial. Counsel, state your ap-
pearances for the record.

Mr. Hutchinson: I am J. Albert Hutchinson,
and associated with me is Leon A. Blum, attorneys
for the plaintiff.

Mr. Ehrlich: I am Philip S. Ehrlich, and asso-
ciated with me is Irving Rovens, counsel for the de-
fendants.

The Court: Now, the first thing, we are supposed

* Page numbers appearing at top of page of original Reporter's
Transcript of Record.

to have a pretrial in all things. I think you gentlemen are aware of that, aren't you? There are six categories here and I will call the roll on them. Is there any prospect of a settlement in this case?

Mr. Hutchinson: I believe not.

Mr. Ehrlich: No, your Honor.

The Court: Any amendment to the pleadings?

Mr. Hutchinson: We don't propose any for the plaintiff, your Honor.

Mr. Ehrlich: None for the defendant.

The Court: Is there any reference here to a Master?

Mr. Hutchinson: I don't believe there is any need or service in that, your Honor.

Mr. Ehrlich: I agree.

The Court: Very well. Now, is there any limitation in relation to expert witnesses?

Mr. Hutchinson: I believe there will be only one expert [3] on the plaintiff's side.

Mr. Ehrlich: Possibly one or two on ours.

The Court: Now, the issues here, what are they, gentlemen?

Mr. Hutchinson: They have been substantially simplified by the pleadings and some further evidence by answers to interrogatories. The action is based on a contract and three alleged breaches of contract. The existence of the contract and most of the outstanding events that are alleged are, I do not believe, disputed. Damages, of course, are disputed and the interpretation of the contract is disputed.

The Court: A written contract, is it?

Mr. Hutchinson: Yes.

Mr. Ehrlich: Yes, your Honor, attached to the complaint.

The Court: Now, is there anything else?

Mr. Ehrlich: I think not, your Honor. I think at this time I should state in connection with a simplification of the issues, that it is our contention that this case should be decided on motions that I will make raising legal issues.

I am raising a question of illegality and voidance of the contract, and that goes as to the entire complaint and the three counts.

Then I raise the issue on the first count that the matters pleaded are a violation of the terms of the contract and a violation of parole evidence—the parole evidence rule, so [4] that as to the first count no testimony can be adduced, and that such count, therefore, does not state a claim for relief.

As to the third count, I raise the same issue, that the contract speaks for itself; that the allegations raising interpretation or surplusage and the conclusions of the pleader does not bind us, and that there is no exception pleaded which permits of parole evidence; and that it is a matter of construction of the contract which is a matter for the court to determine from the face of the contract, which is attached to the face of the contract. In due course I will make my motions.

Mr. Hutchinson: I might say, those matters, I believe, have been passed upon in the motion to dismiss except the claim of illegality, your Honor. That was ruled upon in this department.

The Court: I conclude, then, gentlemen, that the

only thing left to be done is to protect your record, both sides, so that in the event I make any mistakes here you can take advantage of them.

Mr. Ehrlich: Thank you, your Honor.

Mr. Hutchinson: If the Court please, for such assistance as it may be, I have prepared a trial memorandum in which I have attempted to outline the admissions and the denials, and there was a case that dealt with a somewhat similar background decided in this court. Since I had copies [5] of the opinion, I thought it might be helpful to the court.

The Court: Have you served the other side?

Mr. Hutchinson: Yes, I have just delivered copies to counsel, your Honor.

I think it might be helpful if I made a brief statement of the case.

The Court: Proceed.

Mr. Hutchinson: The plaintiff is engaged in the wholesale distribution of various products, principally alcoholic beverages, and engaged in business here, in the East Bay, and in the Monterey Bay area.

The defendant is the result of a merger of three national distributors of alcoholic beverages: Seagram's Distillers Corporation, Calvert Distillers Corporation, and Frankfort Distillers Corporation.

The dealings of the plaintiff were with the Calvert Distiller's Corporation, which is the exclusive national sales agent for products bearing the name Calvert and a series of brands referred to as Carstairs.

In California the defendant Calvert, the present defendants, are licensed as distilled spirits manufacturer's agents. In other words, under our California licensing system a manufacturer may not do business directly in California except under a manufacturer's agent's license, unless the manufacture of distilled spirits occurs in this state, [6] which is not true here. The distribution pattern with regard to distilled spirits manufactured out of the state, therefore, is to have them imported either directly to the wholesaler from outside the state or through the manufacturer's agent for the manufacturer. It is said in the pleadings and I think that would be the evidence, that Calvert and the present defendants do not manufacture but do distribute for companies bearing the same names as the products which they distributed.

Prior to the year 1951 the plaintiff in its three branches engaged in the distribution of Calvert's and Carstair's products, purchasing them from the distributing agent, Calvert, and reselling them to its customers, the retail licensees, who sell both in packages and for consumption on the premises.

In 1951 there was some discussion between the parties resulting ultimately in the execution of a written contract dated, as I recall, March 14, 1952. That contract is appended to the complaint and is admitted. I think there is no dispute of its existence and the accuracy of the document which is attached to the complaint. It is a printed form, prepared by Calvert in this case, and only the name of the distributor, the area involved, certain prices, and other

data of that kind peculiar to the particular distributor is set out in the contract.

One of the provisions of the contract is that Calvert [7] would promote its products.

The Court: Would what?

Mr. Hutchinson: Would promote and advertise its products. And the first cause of action in the complaint deals with an alleged failure to promote Calvert products in plaintiff's area.

I might say at this point that the written contract referred to and dealt only with the Alameda branch of plaintiff's business, which was operated under the business name of Key Distributing Company, and the contract contemplated service in Alameda and Contra Costa Counties.

Our evidence will show, we believe, that not only did Calvert not attempt to promote its products as provided in the contract in support of the plaintiff's distribution of its products, but that Calvert actually assisted others, competitors, to take away the plaintiff's business.

The second cause of action relates to a failure to deliver merchandise as ordered in December of 1952. It is admitted that the order was received, that it was not filled; and it is also admitted that the order was received while the contract was in full force and effect, and that it was filed or delivered in accordance with the contract. It would seem, therefore, that the only issue in that count is the question of damages.

The third cause of action has to do with the question of [8] a renewal of the existing contract.

Paragraphs 11 and 12 of the contract specifically deals with the renewal of that contract.

If I may, I would at this time read the pertinent paragraphs, your Honor.

Paragraph 11 of Exhibit A to the Complaint reads as follows:

“This contract shall be effective for a period of ten months from March 1, 1952. If distributor desires to renew the contract, he shall so notify Calvert not less than 30 days before December 31, 1952.”

Paragraph 12 has to do with what would happen if there were no renewal, and reads as follows:

“In the event that this contract is not renewed, distributor agrees within 30 days after December 31, 1952, it will return to Calvert at its invoice price all of the Calvert merchandise remaining in its inventory.”

When the Complaint was filed the defendant filed in response a motion to dismiss, and that was rather fully briefed on both sides and orally argued. The principal point on the last item here, the question of renewal, depended on the construction of that contract. The Court concluded here that the contract did provide for an option on the part of the distributor. [9]

It is admitted that an attempt to exercise that option was made, and we have attached to the Complaint a letter exercising that option and a letter in response to it which arrived in January of the following year, indicating that there was no renewal contemplated, and no further deliveries, including

the delivery on the order for 900 cases of December 15, 1952.

If the court adhered to that interpretation of the contract, it would seem that there is no issue except as to the amount of damages suffered by the plaintiff on that score.

If I may, I could identify the documentary evidence at this time, those items which are attached to the complaint, so that they might maintain the same numbers.

The Court: Do you wish to make a statement?

Mr. Ehrlich: Yes, I would like to make a statement before we introduce any evidence.

The Court: Very well.

Mr. Hutchinson: I think with that outline, your Honor, and the more detailed showing in our trial brief we might submit the matter for the purpose of the motion which counsel appears to have in mind.

Mr. Ehrlich: If your Honor please, I suggest that in connection with my opening statement, I will combine my opening statement and use it as an argument to support the motion which I would now like to make, and then argue the motions and at the same time consider that as my opening statement. [10]

I first want to make a motion to dismiss the Complaint, and each count of the Complaint, on the grounds that the contract alleged in the Complaint—not the Exhibit 1 which is the actual contract between the parties, but that the contract alleged in the Complaint is illegal and void, violates the Constitution of the State, the Alcohol Control Beverage

Act, and the public policy of the State of California.

Having made that motion, I will argue it in connection with my opening statement.

I direct that, your Honor please, to all three counts as well as the Complaint. So that we contend the court has nothing to do but dismiss on the basis we are here on an illegal contract, a contract against public policy.

All this appears from the allegations of the Complaint. And I say again, that is the contract alleged, not the contract which is attached.

With reference to the first count, if your Honor please, I desire to reiterate the motion as to illegality and voidness, and then to make the motion that no testimony is admissible to vary the terms of the written instrument. Your Honor did hear this at one time, but I feel that the count fails to state a claim for relief, and accordingly, under the law you could raise the failure of the Complaint to state a cause for relief for the first time in the United States Supreme Court.

I know your Honor will examine this in the light of a [11] fuller analysis and discussion of the law applicable to the count. We contend that the allegations which they have inserted in the Complaint and which taint the contract with illegality are inadmissible. There is no evidence to be admitted with respect thereto.

Now, that is as to the first count.

As to the second count, our defense is as follows: that they did not have the right to renew the con-

tract which terminated on a certain date. I will explain that fully to your Honor. The provisional contract says, "If you desire to renew". That is merely the expression of a wish. "If you wish to renew, notify us and we will let you know what we are going to do."

I will go into that fully in the argument.

So that we contend that the second count, when they ordered this merchandise, the time for delivery, the time it took to deliver the merchandise, it could not have arrived here before the termination of the contract under our construction of the contract. In addition to that, we will establish that the order violated the terms of the written contract attached to their complaint.

I will call to your Honor's attention the provisions of the contract which sets forth that at no time can the distributor, in this case the plaintiff, have more than 45 days' supply based on the previous six months' average. And we [12] will show by testimony that had we delivered this merchandise the distributor would have had in excess of a six months' supply. We will also call to your Honor's attention the fact that 708 cases—they ordered 900 cases. Under the contract they returned to us, when we did not recognize their effort to renew, some seven or eight hundred odd cases of merchandise.

We also, of course, direct your Honor's attention to the fact that our first motion goes as to the second count as well, the illegality and voidance.

Now, as to the third count, we again reiterate the

illegality and voidness, and in addition we move that the third count be dismissed on the ground that the contract speaks for itself, and that the only interpretation that the Court can make on that contract is that it terminated by reason of our refusal to join in with their desire to renew. Accordingly, the document speaks for itself. No testimony can be adduced. It is a matter of law for the court to determine. Accordingly, the third count on its face likewise fails to state a claim for relief.

Now, if your Honor please, directing my argument to the motion to dismiss the complaint on the grounds that it is illegal and void.

I first want to direct your Honor's attention in that connection to the allegations of the complaint, and in this [13] connection I call your Honor's attention to paragraph 5 of the Complaint.

May I again reiterate, your Honor, we have a contract here some 15 or 16 pages in length, which was a contract, we admit, that was executed and governed the parties. However, the plaintiff in his complaint and in this first count alleges as follows:

That the defendant, that is to say, the manufacturer distiller's agent, which is the House of Seagram, which is the seller in this case and which succeeded to the Calvert Distilling, which was the original party in agreement—they say here, and I read now from allegation 5:

“Plaintiff is informed and believes and upon that ground alleges that the defendants hereinabove named have been, and still are engaged in the manufacture, importation, exportation and sale of

alcoholic beverages and within the State of California have so engaged, and are licensed to engage, under a distilled spirits importer's license as the same is defined in the Alcoholic Beverage Control Act—”

which is the Act of the State of California controlling the manufacture, sale, distribution and delivery of intoxicating alcoholic beverages within the State of California—

“—and by virtue of such license are lawfully authorized to exercise the privileges thereof and no others [14] within the said state; that defendants are not authorized—” This is their pleading, page 2, line 31— “—are not authorized by said license to enter into, or conduct, or participate in, any transaction respecting alcoholic beverages and, more particularly, a sale thereof, as defined in said Act with persons licensed to sell alcoholic beverages to retail to unlicensed persons, or with unlicensed persons.”

And then they allege in paragraph 7, line 22:

“At all times herein mentioned the defendants have employed salesmen, sometimes known as ‘specialty men’, and directed and required said salesmen to call upon the customers of said distributors—” one of whom was the plaintiff in this action— “in purported support of the sale of defendants’ products by such distributors to such customers; that the said salesmen have at such times solicited—” that is to say, these specialty men, the defendants’ specialty men— “solicited orders and sales, as defined in said Act, for defendants’ products of and to per-

sons other than those licensed in this state as wholesalers, manufacturers and rectifiers, and have submitted the orders so solicited and obtained to defendants' said distributors in such area for delivery thereof."

Now, that's their pleading. That's what their specialty [15] men have done. They have violated the laws of the State of California.

I now, then, read from paragraph 9. This is the gravamen of this situation, your Honor. Not being satisfied with the written agreement, which is attached to the complaint and was the actual agreement of the parties, here is what they allege in paragraph 9—allegation 9:

"One of the conditions of the said written agreement was that the defendants agreed to promote the sale of its products by continuing to employ salesmen sometimes known as 'specialty men' within the counties of Alameda and Contra Costa in the manner and for the purpose specified in the preceding paragraph 7 hereof, and submit the orders so solicited and obtained within the said two counties to the Key Distributing Company for delivery—"

That is the division of the plaintiff which was doing business in Alameda and Contra Costa. In other words, they allege that our specialty men continued to solicit and obtain orders and turned them over to the distributor for delivery.

"On and after March 14, 1952, when the said written agreement was executed between the parties hereto, the defendants did continue to employ such

salesmen, and said salesmen continued to solicit and obtain orders in purported support of the sales of the defendants' products, but failed, neglected and refused to submit all [16] such orders to the Key Distributing Company for delivery, but submitted a substantial portion thereof to other competing wholesale distributors of defendants in the said two counties for delivery."

I direct your Honor's attention to this allegation, in which it is alleged that we indulged in this illegal practice.

Now, paragraph 9 of the complaint: "One of the conditions of said written agreement—" Listen to this, your Honor— "One of the conditions of said written agreement—" It isn't in the agreement, but it is pleaded here as one of the conditions. The word "condition", of course, is merely the plaintiff's conclusion. This is nothing more nor less than an additional obligation which is not contained in the written contract.

And by the way, if your Honor please, paragraph 16 of that written contract provides it cannot be varied or modified except by a written agreement between the parties.

Now, they allege here, "One of the conditions—" That is a condition which they have asserted and pulled out of the thin air and pleaded as a part of the agreement between the parties.

"One of the conditions of the said written agreement was that the defendants agreed to promote the sale of its products by continuing to employ salesmen sometimes known as 'specialty men' within the

counties * * * and [17] submit the orders so solicited.

“* * * On and after March 14, 1952, when the said written agreement was executed between the parties, the defendant did continue to employ such salesmen, and said salesmen continued to solicit and obtain orders—”

But refused and neglected, again I say to your Honor, to turn them over to the plaintiff but gave them to others.

Now, then, the last allegation of the first count:

“By reason of its acts hereinabove stated and particularly by reason of the failure, neglect and refusal by defendants to submit to the Key Distributing Company orders solicited and obtained by the salesmen of defendants within the counties of Alameda and Contra Costa for delivery according to the terms of said implied conditions of said agreement, the plaintiff has been damaged in an amount estimated at \$25,000.00.”

Now, I direct your Honor's attention in connection with my argument on this matter in the first place to the Constitution of the State of California, which provides in substance, Article 22—I will not read it to your Honor at this time, but merely resume it for your Honor—that the subject of the sale of intoxicating alcoholic beverages is a matter clearly within the domain of the Legislature to make such rules and regulations, and that the liquor industry—that the sale, distribution, manufacture and delivery of alcoholic [18] beverages cannot be engaged in in the state of California save and ex-

cept under the rules and regulations provided by the Legislature, and that it cannot be done other than by persons properly licensed to do so.

Now, I call your Honor's attention to the alcoholic Beverage Control Act, which is the Act passed by the Legislature governing the manufacture, sale and distribution of alcoholic beverages in the state of California. And I make this statement to your Honor, that this pleading here of this alleged implied condition is violative of the Constitution, the public policy of the State and statutory law.

Now, I read to your Honor from the Business and Professions Code, the Alcoholic Beverage Control Act, Section 23,001, where the Legislature of the State of California has pronounced the public policy. And I need not tell your Honor, that the sale, manufacture and distribution of alcoholic beverages has been from time immemorial a subject of the police powers of the State. It has been from time immemorial that this type of activity is, more than any other, subject to police power.

But we don't need to rely on the common law. The Legislature of the State of California has expressed its public policy in regard to this matter. I quote to your Honor Section 23,001 of the Alcoholic Beverage Control Act.

"This division—" talking about the Alcoholic Beverage Control Board— "This division is an exercise of the [19] police power of the State for the protection of the safety, welfare, health and morals of the people of the state, to eliminate the evils of unlicensed and unlawful manufacture, selling, and

disposing of alcoholic beverages, and to promote temperance in the use and consumption of alcoholic beverages. It is hereby declared that the subject matter of this division involves in the highest degree the economic, social, and moral well-being and the safety of the State and of all its people. All provisions of this division shall be liberally construed for the accomplishment of these purposes.”

Now, there you have the declared policy of the people of the state of California.

Now, I want to read to your Honor next some quotes from the Alcoholic Beverage Control Act, a definition of the word “sell”. I read from Section 23,025 of the Alcoholic Beverage Control Act. And I emphasize to your Honor that this implied condition, not contained in the written contract, comes exactly within the purview of the definition of the word “sell”. I will then show to your Honor after I have established that, that what they have alleged here is contrary to public policy, contrary to law, because the defendant, as a manufacturer’s agent, had no right to sell to retailers. He could only sell to wholesalers. And what we did was sell to retailers under the definition contained in the Alcoholic Beverage Control Act. [20] I read now the definition of the word “sell”:

“ ‘Sell’ or ‘sale’ and ‘to sell’ includes any transaction whereby, for any consideration, title to alcoholic beverages is transferred from one person to another, and includes the delivery of alcoholic beverages pursuant to an order placed for the purchase

of such beverages and soliciting or receiving an order for such beverages * * *”

They have alleged in this complaint that we, as manufacturer’s agent solicited and received orders but failed to turn them over to them, to the plaintiff, whereas we should have done so, but turned them over to other distributors. And they define in the Alcoholic Beverage Control Act the word “sell” as specifically including within that term soliciting and receiving an order.

I now read to your Honor the section for “Necessity of Life”:

“No person shall exercise the privilege or perform any act which a licensee may exercise or perform under the authority of a license unless the person is authorized to do so by a license issued pursuant to this division.”

We had no right to do this. I will call that to your Honor’s attention in the next provision of the Alcoholic Beverage Control Act. And then the section goes on to make [21] the violation of this Act a misdemeanor.

Now I read to your Honor Section 23,355:

“Except as otherwise provided in this division and subject to the provisions of Section 22 or Article XX of the Constitution, the licenses provided for in Article II of this chapter authorize the person to whom issued to exercise the rights and privileges specified in this Article and no others.”

In other words, the only right that we could exercise are the rights which the license gives and none

other. Our right was to sell to the wholesalers as a manufacturer's agent.

Now I direct your Honor's attention to Section 23,366 having to do with the rights of the distilled spirits manufacturers' agent license. That was the license that we had as a distilled spirits manufacturer's agent. I read from subdivision (d) thereof. It goes on to give us certain other privileges with which we are not concerned in this case. Subdivision (d) thereof reads as follows:

"Whether cut, blended, mixed, flavored, or colored by him, or any other person, the packaging and the sale or delivery of distilled spirits only to holders of distilled spirits manufacturer's, rectifier's or distilled spirits wholesaler's licenses."

Manufacturers isn't involved here. Rectifiers isn't [22] involved here. "Distilled spirits wholesaler's licenses".

In other words, we as manufacturer's agents could only sell to these three groups—the manufacturer, the rectifier, or distilled spirits licensee. And then it goes on to say the violation of this also constitutes a crime.

Now I direct your Honor's attention to the allegations of the complaint, which I have read to your Honor, which state that there was an implied condition of this contract, and this is the contract which is before your Honor and the contract on which they stand or fall. One of the conditions of that was that condition which they claim, and which, of course, we deny, as a matter of fact, but for the purpose of the suit here they are before

your Honor on a contract which violates the Constitution, public policy as I read, and the statutory law.

Now, I say to your Honor, I am not relying on my interpretation, although I feel that it is complete and sound. I feel unqualifiedly that there is no out from the allegations of their complaint. But I want to call to your Honor's attention, there was a case somewhat similar in which this counsel for the plaintiff acted as counsel for the plaintiff, a case in Los Angeles, and at that time—I have a copy of the transcript of that case, and I want to read to your Honor the statement that counsel for the plaintiff sitting here made with respect to this very matter and with respect to the [23] allegations which he has pleaded as an implied condition of the contract.

Mr. Hutchinson: Counsel, I don't think this plaintiff should be charged with counsel for some other plaintiff.

Mr. Ehrlich: Well, I want to show counsel's interpretation, if your Honor please, of this very provision of the contract, and I think it is a legitimate statement to be made in connection with an argument for your Honor.

The Court: Proceed.

Mr. Ehrlich: I read from the case of A.B.C. Distributing Corporation, plaintiff, vs. Distillers Distributing Corporation, in the Superior Court of the State of California, in and for the County of Los Angeles, No. 635,634, Reporter's Daily Transcript, Wednesday, May 23, 1956. I read from page

605. This is a statement made by Mr. Hutchinson as counsel:

“A competitor of the plaintiff—” that was a distributor, as this plaintiff here is a distributor—
“—as another distributor had the privilege to compete, but Calvert—” that was the original defendant here— “—had no privilege to compete for the customers of these retailers because they could not deal with them legally. The plaintiff’s customers were not among the class of licensees which the manufacturers, Calvert *and were* entitled to deal, and therefore, any effort to do so was unlawful.” [24]

And we have quoted our early instruction, that is, Code Section 1667, that that is not lawful, which is contrary to the express provision of law, contrary to the policy of express law, although not expressly prohibited or otherwise contrary to good morals.

That is a statement by counsel that the defendant in this case, the manufacturer’s agent, had no right to solicit or receive or sell and turn over orders to retailers—or to distributors, rather. He had no right to solicit the retailer, to receive an order from him, and turn it over to the distributor.

But we don’t have to go to Los Angeles. We only have to go to the case before your Honor here and to counsel’s opening brief, and I will prove from counsel’s opening brief that the implied condition which he is contending in his complaint he admits to be illegal.

This is a brief which he submitted in connection

with the motion to dismiss. At that time we had not raised this question of illegality as we are raising it today. I call to your Honor's attention the plaintiff's memorandum in opposition of the motion to dismiss and in reply to the defendant's statement of reasons and authorities.

I read from page 8 of this memorandum. Counsel states as follows:

"A. The First Cause of Action: Defendant's breach [25] of the contract in failing to promote the sale of its products through plaintiff, as its distributor, in accordance with the contract."

So he indicates there that this is not a condition but really an additional provision which he is now trying to insert in the written agreement.

He then goes on to allege:

"Plaintiff's first cause of action is addressed to defendant's breach of its undertaking to promote the sale of its products in plaintiff's territory by continuing——"

That is a quotation from the Complaint, the allegations which I have read to your Honor from Paragraphs V, VII, VIII and IX, which I have read to your Honor and which I will not repeat.

He aspirates these quotes from the allegations of his Complaint, and then he has this note. After citing these allegations from his Complaint, this implied condition,

"By express statutory proscription, defendant is prohibited from making sales or deliveries to licensed retailers and its promotional activities can only be carried out as 'in support' of its distribu-

tors, whose licenses alone permit sales to retail licensees.”

And I read to your Honor from the Alcoholic Beverage Control Act the definition of the word “sell” which says, [26]

“Solicit and receive and turn over orders to other wholesalers for delivery.”

So that he here in his own memorandum admits that the wholesaler could not—that the manufacturer’s agent could not sell to the retailer, but fails to realize that the definition of “sale” includes the soliciting and receiving and turning over to the wholesaler the order that he solicited and received for delivery. So I say to your Honor that in this memorandum that counsel filed, he substantiates the position I am taking as to the illegality of the contract.

I also read to your Honor from page 10, so there can’t be any question. I am reading from counsel’s memorandum:

“It may not be disputed, therefore, that defendant expressly promised and agreed to promote the sale of its product through solicitation of orders for submission to plaintiff as its distributor.”

Which, of course, comes clearly within the purview of the section which defines the word “sell,” and then comes within the purview of the section which prohibits the manufacturer’s agent, which is defendant in this case, from selling to anyone but a manufacturer, a rectifier or a wholesaler.

I could go on to read other provisions from the brief. The same holds true in page 12 of his brief

where he again reiterates the same solicitation, receiving and turning over, and that this was one of the contractual obligations of the [27] plaintiff.

I also direct your Honor's attention to this proposition of law, that Section 1,441 of the Code of Civil Procedure reads as follows—Excuse me, your Honor, I have it right here.

Well, I will find it in a minute, your Honor. Let's assume just for the purpose of argument, which I don't concede, but for the sake of argument that instead of it being a contractual obligation, and I contend it isn't anything else, this obligation of ours which he alleges as a condition, I say to your Honor that under the Code Section which covers condition the same holds true, because if the condition is illegal, the contract must be thrown out.

I direct your Honor's attention to Section 1441 of the Civil Code which provides:

“A condition in a contract the fulfillment of which is impossible or unlawful within the meaning of the Article on the objects of contract is void.”

So I say to your Honor, whether it is a condition or whether it is a provision of the contract which he is trying to insert into the written agreement, the condition is illegal and he is before your Honor on a contract which violates, again I say, the Constitution, public policy and statutory law.

I need not read to your Honor—I am sure your Honor [28] knows the provisions I have here of Cal. Juris. stating the effect of the illegality of a contract, that no relief can be given on the contract.

Now, that goes as to my motion on illegality and avoidance.

Directing your Honor's attention now to Count 1, while your Honor has ruled upon this at the time, I feel we are entitled to express our point of view to your Honor and to differ with the original ruling that your Honor made on the motion to dismiss, and have at this time a more thorough exposition of this matter, a greater opportunity to develop it, present our authorities to your Honor. I am satisfied, and the reason that I again present this to your Honor is because of the fundamental rule of law that if the complaint states no claim for relief it can be raised in the United States Supreme Court or any place at any time.

Now, I direct your attention that Count 1 contains this implied condition, but the contract is attached to the complaint and this contract contains the following provision. I read the last provision of the contract. I am reading from Paragraph XVI of the contract.

The Court: Pardon me just a minute. Where is that?

Mr. Ehrlich: Paragraph XVI, your Honor.

The Court: Very well, proceed.

Mr. Ehrlich: Your Honor will realize that under this provision the parties agreed that this agreement represented [29] the entire understanding, the entire agreement between the parties, and cannot be modified except in writing, duly executed by both parties. Now, here is a flagrant effort to violate the provisions of this agreement by inserting in the

contract another provision, because when we analyze it, what does he say? He says that the defendant here was obligated—this is a verbal understanding—we were obligated to solicit, receive orders, sell the merchandise, and then turn it over to the plaintiff for delivery, and to take care of the other details.

But this agreement here provides that it is the entire story, that nothing else can be added, it can't be changed, it can't be modified, it can't be varied.

But forget this provision 16, and assuming we didn't have a provision 16, we still have the parol evidence rule. The only way that this contract, assuming 16 wasn't in it—with 16 in it, it can't be modified except in the way the parties provide. But assume that wasn't in it, the parol evidence rule provides that you cannot vary or add or subtract from a written agreement unless you plead fraud, mistake, or there is some special reason why the parol evidence rule is not applicable.

So I say to your Honor that the condition—forgetting the illegality; I am finished with that argument—forgetting that and relying now on the terms of this written contract, [30] by virtue of Paragraph XVI and by virtue of the parol evidence rule your Honor must hold as a matter of law that this count does not state a cause of action.

We, of course, deny—I am not going into the merits, I am merely arguing these legal issues, because we deny that any such condition was ever entered into between the parties. So I say to your

Honor that as a matter of law the Complaint fails to state a claim for relief.

I will not argue the second count other than to again direct your Honor's attention to my argument on illegality, which applies to that.

Now, the third count, if your Honor please, we also again say to your Honor that on further analysis of the third count your Honor must determine that as a matter of law there is no claim for relief here.

This legal argument depends—it is a very simple situation—depends entirely on the construction of the provisions of the contract. And I direct your Honor's attention to Paragraph XI, which is the paragraph which we are discussing. Paragraph XI reads as follows:

“This contract shall be effective for a period of ten months from March 1, 1952. If distributor desires to renew the contract——”

Desires, that is the word.

“——desires to renew the contract, he shall so [31] notify Calvert not less than 30 days before December 31, 1952.”

And then it goes on to provide that if it isn't renewed, in Paragraph XII:

“In the event that this contract is not renewed, distributor agrees that within 30 days after December 31, 1952, it will return to Calvert at its invoice price all of the Calvert merchandise remaining in its inventory.”

I read that to your Honor so that your Honor

can understand that the parties had in contemplation that the contract might not be renewed.

Now, I say to your Honor that that provision of the contract is a matter of construction for the Court to determine. The plaintiff is asking you here to determine that this contract is what? It's a right, privilege or option. No words were used to that effect. It would have been very simple for the parties, if they wanted to give any party a right to renew, a permit to renew, an option to renew, they could have said very readily there, "The distributor has the right, the option and the privilege to renew."

They didn't say that. They didn't give him the right, privilege and option. They said, "If he desires to renew the contract, if they wish to renew it, notify Calvert. Calvert will let them know what they want to do."

And that is very understandable. This otherwise becomes [32] a perpetual contract, and your Honor knows that perpetual contracts are frowned at in law, and unless it is essential to contrue a contract as a perpetual contract it will not be so contrued.

But this is a provision to protect the House of Seagrams, as the present defendant is, so that they might know; if the distributor wanted to give the matter up, they wanted 30 days' notice so that they could get another distributor, or if they weren't satisfied, but they wanted to get the first reaction from the distributor if he wished to renew.

So again I say to your Honor, they are asking your Honor to strike out the word "desire" and

insert in lieu thereof "right, privilege, option," and this contract does not so provide.

So I say to your Honor that both by reason of the argument previously made, Section 16, no parol evidence can be adduced here, no evidence can be introduced by reason of Section 16, and the parol evidence rule prevents the introduction of any evidence. It is for your Honor to determine what was meant as a matter of law just from the face of this contract, whether the word "desire" can be construed to mean "option, right and privilege."

Concluding my argument and my opening statement and my motion in support of my motions, I would ask your Honor at this time to dismiss the complaint on the grounds which I have [33] mentioned, and all counts, on the ground of illegality and voidance for the reasons I have indicated to your Honor; and if your Honor doesn't see fit to do that, to dismiss Count 1 for the grounds that I have suggested to your Honor and Count 3 on the ground that I have suggested to your Honor.

Thank you.

Mr. Hutchinson: May it please the Court, we have a somewhat anomalous position, it seems to me, before us. Calvert prepared this contract in printed form, as stipulated in the exhibit here, in large numbers or it would not have been printed, and now stands before this Court and claims the contract was criminal.

Mr. Ehrlich: That is not correct, your Honor. Pardon me. Pardon the interruption. I made a

special statement that the contract attached to the complaint is legal, but the condition which they pleaded as a part of the contract is illegal.

The Court: He limited his argument on the pleadings, not the contract.

Mr. Hutchinson: The pleading is that, "thereafter plaintiff and defendant entered into the resolution of their respective rights and duties under said agreement by and in consideration of the execution of a certain written agreement, hereinafter referred to as "The written agreement," dated March 15, 1952, copy whereof is annexed hereto marked 'Exhibit [34] 1' and incorporated herein by this reference as fully as if the same were set out verbatim and at length herein.

"One of the conditions of the said written agreement was that the defendants agreed to promote the sale of its products by continuing to employ salesmen sometimes known as 'specialty men'."

The pleading refers to no agreement and no condition not within the written agreement just identified by reading from Paragraphs VIII and IX. We claim no agreement other or different than the one attached. If the agreement is not illegal, then there is certainly no argument on this question of illegality. [35]

* * * * *

Now, as to the third, the question of option, we both read Paragraph XI and I think the Court probably can recall it fully. It gives to one party only the right to elect whether to renew.

The Court: What was that statement? I didn't follow that.

Mr. Hutchinson: It gives to the distributor the right to determine whether he desired to renew. If he desired to renew, all he had to do was notify Calvert. The paragraph is very short:

"If the distributor desires to renew the contract, he shall so notify Calvert not less than 30 days before December 31, 1952."

In our memorandum on the motion to dismiss, which the Court has already considered, we cited not only the general authorities but, I think, something like 30 cases in which identically or comparably worded provisions were held to be options, and to give the option to the person who was to give the notice.

We cited cases from nearly every jurisdiction, and that [39] memorandum, commencing with page 30, lists a good dozen cases where that precisely was held. [40]

* * * * *

However, the 1953 contract, when they made the new contract with the distributor in 1953 and later, their printed form read differently, and reads the way they tried to express this clause in their answer. They didn't say what they say here, that the distributor, if he desires to renew, shall give notice. It says if he desires to renew he shall apply for a renewal. And in one of the cases counsel referred to in quoting one of the plaintiff's counsel, the Court decided that the "applied for" meant—

The Court: Suppose there was a refusal. Where would we find ourselves then?

Mr. Hutchinson: That is what we have here, your Honor, [41] and the substantive law on that is quite clear. Our California Supreme Court in *Brodel vs. Warner Brothers*—or perhaps it was *Warner Brothers vs. Brodel*. I will find that for you in a moment, your Honor. They specifically announce the rule which provides—I am reading from page 26 and 27 of the memorandum on the motion to dismiss. I am quoting from the court, 31 Cal. 2d 766, 773; 192 Pac. 2d 949, *Warner Brothers Pictures vs. Brodel*.

“The creation of the final contract requires no promise or other action by the optionor, for the contract is completed by the acceptance of irrevocable offer of the optionor by the optionee. The contract has already been made, as far as the optionor is concerned, but is subject to conditions which are removed by the acceptance. Thus the option contract gives the optionee a right against the optionor for performance of the contract to which the option relates upon the exercise of the option, which the optionor cannot defeat by repudiating the option.”

Then there are cases cited and the quotation continues:

“Since the optionor promises to perform the contract to which the option relates, subject to a condition at the discretion of the optionee, an option contract involves on the part of the optionor a unilateral promise to perform the obligations of the contract to which the [42] option relates.”

In other words, this contract by the simple exercise of the option provided for in Paragraph XI and the giving of notice within the time required merely continues the exact contract for the extended period. And that is all any option does. There are millions of such options.

The Court: Extended period? What do you mean?

Mr. Hutchinson: The new period. The same period as the old period. That is what happens in leases.

The Court: That is the reason I queried. It goes on for another year, let us say.

Mr. Hutchinson: Yes.

The Court: Under your position the contract would go on indefinitely.

Mr. Hutchinson: The cases on that point are not as clear as they are on the other points, your Honor. I might say that if it were an issue, it would be resolved in favor of the plaintiff's position, if it was necessary to take the position that you had a right to renew annually. In the Coca-Cola cases decided in the——

The Court: (Interposing) You are taking me by surprise, I want to tell you frankly, on that phase of this litigation. That would be a continuing contract forevermore under your reasoning.

Mr. Hutchinson: Not necessarily. [43]

The Court: I say that so that you will be advised.

Mr. Hutchinson: Not necessarily. However, the cases have held in the instance of leases where op-

tions, of course, are most common, that the renewal provision is not itself renewed. That is, all the contract is renewed except the renewal provision, so that in each case, unless it is spelled out differently, the option in effect functions once, and the theory apparently is that an option is merely an irrevocable offer. When you make an offer and you accept it, then you have a contract and, unless you make another offer, there is not another.

The Court: May I offer a suggestion here?

Mr. Hutchinson: Yes, your Honor.

The Court: Keeping in mind the story of this matter, when was it first filed?

Mr. Hutchinson: My recollection is it was 1954.

Mr. Erhlich: It was filed August 25, 1954, your Honor.

The Court: I suggest this, and both sides are protected: For the purpose of the record I will deny the motion at this time without prejudice and we will proceed to marshal the facts in this case. I anticipate no difficulty finally, gentlemen, unless I am taken by surprise. I am not too familiar with what is ahead of me. If that is agreeable——

Mr. Hutchinson: That is quite agreeable to us, your Honor. [44]

The Court: Now, let me offer another suggestion: Aren't there some stipulations you might enter into here in relation to the proof that can't be challenged?

I am going to take a recess and you can get together. You may agree. If you do agree on some

matters, let it be read into the record. Is that agreeable?

Mr. Hutchinson: Yes, your Honor.

The Court: All right, we will be at recess.

(Short recess.)

Mr. Hutchinson: If your Honor please, I believe we are able to follow up the suggestion of the court to some extent, and at this time I will offer in evidence a carbon copy of a contract signed by both parties, which is appended in photographic form to the complaint, as plaintiff's exhibit first in order.

Mr. Ehrlich: No objection.

The Court: Let it be admitted and marked next in order.

(Contract referred to admitted into evidence as Plaintiff's Exhibit 1.)

Mr. Hutchinson: We then offer as Plaintiff's Exhibit 2 a carbon copy of a purchase order No. 07094, dated December 15, 1952, copy of which is appended to the complaint.

Mr. Ehrlich: No objection.

The Court: Let it be admitted and marked.

(Purchase Order No. 07094 admitted into evidence as [45] Plaintiff's Exhibit 2.)

Mr. Hutchinson: We now offer in evidence carbon copy bearing the signature of J. C. Millett of a letter addressed to Calvert Distillers Corporation and dated November 18, 1952, which is also attached to the complaint.

Mr. Ehrlich: Defendant received the original. No objection.

The Court: Let it be admitted and marked.

(Letter referred to admitted into evidence as Plaintiff's Exhibit 3.)

Mr. Hutchinson: We now offer as Plaintiff's Exhibit next in order a letter on the letterhead of Frederick J. Lind, an attorney of New York City, Chrysler Building, dated January 26, 1953, and addressed to Leon A. Blum, Esq., San Francisco.

I believe it will be stipulated, will it not, gentlemen, that Mr. Lind wrote the letter for Calvert?

Mr. Ehrlich: Representative of Calvert. We so stipulate.

The Court: Let it be admitted and marked.

(Letter referred to admitted into evidence as Plaintiff's Exhibit 4.)

Mr. Hutchinson: Now, with regard to the complaint, it occurred to us that we could briefly summarize the things which are admitted, and we have some stipulations as we [46] progress which could be identified for the record.

The Court: Identify it for the purpose of the record.

Mr. Hutchinson: The allegations of Paragraph I of the plaintiff's Complaint, which briefly recites the name and nature of the business and the license status of the plaintiff, are admitted.

Mr. Ehrlich: Admitted.

Mr. Hutchinson: Paragraph II is also admitted. It briefly identifies the divisional operation of the plaintiff and makes reference to Key Distributing, which is the East Bay operating agent.

Mr. Ehrlich: Allegation 2 admitted.

Mr. Hutchinson: Paragraph III relates to the

Monterey branch, Monterey County Liquor Company, which is admitted.

IV is admitted as to the present defendant, but not as to Calvert.

Mr. Ehrlich: We might clean that up, too, Mr. Hutchinson. As the result of your mentioning in your opening statement the corporate reorganization, the only defendant before this court now is the House of Seagrams.

Mr. Hutchinson: Yes.

The Court: Let the record so show.

Mr. Hutchinson: And Paragraph IV, then, would be true as to the House of Seagrams, and, as to the dates when Calvert operated independently, true as to Calvert Distillery. [47]

Mr. Ehrlich: It isn't in the litigation at the present time, nor is Carstairs. The only defendant before the court is the House of Seagrams.

Mr. Hutchinson: Yes.

Paragraph V, which deals briefly with the statutes that apply, is admitted in the following respects:

Plaintiff recites he is informed and believes, and this is the allegation:

“Defendants still are engaged in the importation, exportation and sale of alcoholic beverages within the state of California, and so engaged and are licensed to engage under a distilled spirits importer's license as same as defined in the Alcoholic Beverage Control Act, as amended,” giving the citation to the statute.

“That defendants are not authorized by said

license to enter into or conduct a sale as defined in said Act, to persons licensed to sell alcoholic beverages at retail to unlicensed persons, or with unlicensed persons.”

Paragraph VI is admitted in these respects only:

“The defendants were engaged in the importation and sale within the state of California of certain distilled spirits products, including but not limited to products bearing the label and designation of Lord Calvert, Calvert Reserve, Calvert Distilled London Dry Gin, and Carstairs White Seal.”

I believe we have an admission or, rather, a stipulation with regard to a denial of control of the trademarks, and if I may, I will attempt to state that stipulation.

The Calvert Distillers Corporation at the time involved in this action, and the defendant now, while not the owners of those trademarks, were the exclusive distributors throughout the United States of products bearing those trademarks.

Mr. Ehrlich: The first and last clauses of the contract set that forth, your Honor, so we stipulate. It reads as follows:

“Whereas, Calvert has the sole and exclusive right to distribute within the United States the alcoholic beverages produced by The Calvert Distilling Company, and Carstairs Brothers Distilling Company, Inc., and from time to time may have the exclusive right to sell other alcoholic beverages.”

The Court: So stipulated?

Mr. Ehrlich: Yes.

Mr. Hutchinson: Yes.

The Court: Very well.

Mr. Hutchinson: Parenthetically, I might say that is for the purpose of showing these products were not available from other sources.

Paragraph VII is admitted in part, and I will read the admitted portions: [49]

“At all times herein mentioned the defendants have sold and distributed said products within the state of California.”

Mr. Ehrlich: Make it “defendant.” We are now talking about the House of Seagrams for the stipulation purposes.

Mr. Hutchinson: All right. “This defendant has sold and distributed its said products in the state of California through wholesale licensees designated or appointed by the said defendant as its respective distributors within a particular geographical area thereof, and have limited and restricted the sale of its said products to such wholesale licensees so designated or appointed. At all times herein mentioned the defendant has employed salesmen, sometimes known as ‘specialty men’.”

That is all in Paragraph VII that is admitted.

In Paragraph VIII this portion is expressly admitted:

“For about ten years prior to March 1, 1952, plaintiff J. C. Millett Company and its affiliates Key Distributing Company and Monterey County Liquor Company, were engaged in the wholesale distribution of defendant’s said products within

several counties in the northern section of the state of California.”

Mr. Ehrlich: So admitted.

Mr. Hutchinson: The remainder of Paragraph VIII is [50] denied.

IX is denied. Paragraph X is denied. The latter relates to damages.

As to the second cause of action, both parties repleaded portions of the first cause of action and their defense, and they appear in Paragraph I and have already been adverted to that extent.

Paragraph II is admitted in full, and it reads as follows:

“On December 15, 1952, while the said agreement dated March 14, 1952, was still in full force and effect, and pursuant to and in accordance with the terms thereof, the Key Distributing Company executed and delivered to the defendant a written purchase order requesting shipment of 900 cases of various types of products of the defendant, copy of said purchase order is attached hereto marked Exhibit 2 and incorporated herein by this reference.”

That is all in Paragraph II.

Paragraph III of the same second cause of action is admitted in part in this regard.

“The defendant failed to ship and deliver to the Key Distributing Company——”

Mr. Ehrlich: No, we don't admit that. We say we did not ship and deliver, not that we failed, your Honor. Here is what we will stipulate, only that

it did not ship and deliver to Key Distributing Corporation 900 cases of any [51] products at all.

Mr. Hutchinson: That is, I think, acceptable. The remainder of the paragraph relates to damages, which is denied.

In the third cause of action the first paragraph is a repleading in both the case of the complaint and the answer.

The second paragraph is denied in toto on information and belief.

Paragraph III, portions are apparently admitted and I will read those:

“The written agreement between the parties hereto dated March 14, 1952, and hereinabove referred to included a provision therein reading as follows:

‘11. This contract shall be effective for a period of ten months, from March 1, 1952. If distributor desires to renew the contract, he shall so notify Calvert not less than 30 days before December 31, 1952.’ ”

There are some partial admissions, but stated in their own language, portions of that which will be adverted to in reference to the answer.

Paragraph IV is admitted in this regard:

“On November 18, 1952, and while the said agreement was still in full force and effect, the Key Distributing Company——”

Mr. Ehrlich: No. [52]

Mr. Hutchinson: You will have to read it, I think.

Mr. Ehrlich: Defendant admits it received the

letter attached to the Complaint as Exhibit 3, while the agreement of March 15, 1952, was still in full force and effect.

Mr. Hutchinson: Thank you. I think that will suffice on that.

The fifth paragraph is denied in toto, but there is a separate admission as to the failure to renew which perhaps you would like to read.

Mr. Ehrlich: Yes. Defendant admits that it has not renewed the agreement between the parties dated March 14, 1952.

Mr. Hutchinson: The concluding paragraph of the third count is No. VI, which relates to damages and is denied in toto.

Now, I believe we can stipulate at least to a portion of certain other facts.

First, if witnesses were called, witnesses would testify that the contract's paragraph 11, which has been adverted to in argument and in the pleadings, was modified in the contracts newly written in 1953 to read as follows, this stipulation to be subject to any objection which counsel wishes to make to the evidence, but merely as a means of getting it before the court without calling witnesses.

Mr. Ehrlich: Will you read that statement again?

The Court: Read it, Mr. Reporter. [53]

(Statement read by the reporter.)

Mr. Ehrlich: You have left there the blank there?

Mr. Hutchinson: Yes, I was going to read that, but I wanted your objection to appear.

Mr. Ehrlich: We can't—

The Court: (Interposing) Pardon me. If there is any question about it, you had better not stipulate.

Mr. Ehrlich: We can't stipulate because I have 15 or 20 objections to the testimony.

Mr. Hutchinson: Now, has counsel been able to ascertain whether it is possible to stipulate that on December 15, 1952, there was in San Francisco or the East Bay supplies of its products described in the order dated December 15, 1952?

Mr. Ehrlich: No, we will not so stipulate.

The Court: Now, what about the original contract? Is it available?

Mr. Hutchinson: Yes, that has been introduced.

Mr. Ehrlich: That is the first exhibit.

Mr. Hutchinson: Would it be helpful to have that read to the court so that we may have before us the details?

The Court: You may, the pertinent parts of it.

(Thereupon the agreement, Plaintiff's Exhibit 1, was read into evidence by Mr. Hutchinson.)

Mr. Hutchinson: It is signed by Walter F. Terry for the Calvert Distillers Corporation, and by J. C. Millett for [54] the plaintiff. Attached thereto are the exhibits, which are Exhibit A, the Schedule of Prices, and the second is a list of other products, or perhaps all products then distributed by the plaintiff, for the purpose of the 90-day notice of any change.

Mr. Ehrlich: Mr. Hutchinson, at this time, be-

fore you put in your testimony, I would like you to admit certain documents, if you will. Here is the first one (handing document to counsel.)

Mr. Hutchinson: Counsel has exhibited a letter to Frederick J. Lind, sent by Leon A. Blum on behalf of the plaintiff. We can stipulate that that letter was dispatched on or about the date it bears.

The Court: It may be admitted as next in order.

(Letter referred to admitted into evidence as Defendant's Exhibit A.)

Mr. Hutchinson: Counsel has exhibited to us a letter dated February 24, 1953, addressed to Calvert Distillers at its San Francisco office by Key Distributing Corporation, through its comptroller, to which are appended an invoice and two carbon copies of the credit memo. Subject to the opportunity to show a mistake, if any should appear, we will stipulate that the letter with the three enclosures was dispatched at or about its date.

The Court: It may be admitted as next in order.

(Letter referred to admitted into evidence as Defendant's Exhibit B.)

Mr. Ehrlich: Mr. Hutchinson, we would like to introduce this, the answer to Question No. 4 in the interrogatories, showing the inventory on hand on those three dates.

Mr. Hutchinson: I see no objection to receipt of the answers to interrogatories.

Mr. Ehrlich: No.

Mr. Hutchinson: It occurred to me we might introduce all of the plaintiff's—

Mr. Ehrlich: (Interposing) No, I wouldn't stip-

ulate to that because we contend some of the interrogatories are subject to objection. That is why I specified this one, which goes to the proof of one of the provisions of the contract, one of our defenses, as to whether we had the right to refuse your order, and count two, based on the inventory on those dates.

Mr. Hutchinson: Well, this interrogatory was proposed and we will stipulate that this is the answer. We wouldn't wish to stipulate to any of the inferences that might flow from it.

Mr. Ehrlich: No. This just shows the inventory which you gentlemen had on hand those respective dates. The figures shown there are the figures of the inventory. The value of it is a matter for us to argue. [56]

Mr. Hutchinson: That is right.

Mr. Ehrlich: Could the reporter copy this?

The Court: You might read it.

Mr. Ehrlich: Well, it is a series of—May I show this to your Honor? It is a series of numbers. We will have the reporter copy the answer to Interrogatory No. 4.

Reporter's Note: Answer to Interrogatory No. 4, referred to above, is as follows:

Brand	Size	Inventory on Hand		
		Dec. 15 1952	Dec. 31 1952	Jan. 31 1953
Lord Calvert				
	one-half gallon.....	15	15	15
	quarter gallon	13
	fifth gallon	118	73	56
	Pint	40	35	28
	one-half pint	56	41	29

Brand	Size	Inventory on Hand		
		Dec. 15 1952	Dec. 31 1952	Jan. 31 1953
Calvert Reserve				
	one-half gallon	11	9	7
	quarter gallon	132	80
	fifth gallon	196	103	82
	pints	265	217	144
	one-half pint	289	235	151
Carstairs				
	one-half gallon	22	22	22
	quarter gallon	84	84	82
	fifth gallon	67	66	64
	pint	2	2	2
	one-half pint	14	14	14
Calvert Gin				
	quarter gallon	56	51	31
	fifth gallon	19	14	12
	pint	2	1
	one-half pint	10	9	9

The inventory is of full cases only and does not include individual bottles. [57]

Mr. Ehrlich: (Continuing) Mr. Hutchinson, in answer to Interrogatory No. 5, you attach an exhibit to Interrogatory 5 of the principal suppliers of brands of alcoholic beverages referred to and the periods of distribution of plaintiff, as set forth in Exhibit 1 hereto, and made a part hereof by reference. We would like to have that copied in as a stipulation, that this correctly reflects the matters set forth which I have just read. This was your response to Interrogatory 5.

Mr. Hutchinson: We will stipulate that the inventory shows that. We, however, object on the ground that it is incompetent, irrelevant and immaterial and outside any issues in this case; particularly for the reason that it is not claimed that plain-

tiff violated the restriction on taking on new products in the answer.

Mr. Ehrlich: No, but it goes to the question of damages. We are going to contend, if it ever gets to that issue, that the damages were minimized by these facts.

Well, why don't we leave it go in subject to motion to strike, and get it into the record so we don't have to call witnesses to it?

Mr. Hutchinson: Well, if it is being offered in mitigation, that is a point that hadn't occurred to me. But if we could reserve our objection stated until that time, we would have no objection to having it incorporated in the record. [58]

Mr. Ehrlich: Then the reporter will copy in the response to Interrogatory No. 5.

Reporter's Note: Response to Interrogatory No. 5 referred to above is as follows:

The principal suppliers from whom plaintiff purchased alcoholic beverages for resale during the period indicated include the following (unless otherwise indicated, purchasing was initiated prior to March 1, 1952):

Manufacturer or Importer: 1. Parrot & Co.
Period: Throughout. Principal trade names: Teachers Scotch, Hennessy Cognac, Gordon's Gin.

2. The Fleischmann Distilling Corporation.
Period: Prior to May 1952. Principal trade names: Fleischmann's Preferred, Fleischmann's Gin.
Period: Resumed July 20, 1953 to date. Principal trade names: Black & White Scotch, Churchill's Old Heirloom.

3. James A. Barclay & Co. Ltd. Period: Prior to August, 1952. Principal trade names: Corby's Whiskey and Gin, Barclay's Whiskey and Gin, The Grand Macnish.

4. Associated Brands, Inc., Melrose Sales Division. Period: March, 1953 to date. Principal trade names: James E. Pepper, Echo Springs, Melrose Gin, Old Charter, Old Quaker, Three Feathers, Wilken's.

5. Brown-Forman Distillers Corp. Period: Prior to May, 1952. Principal trade names: Old Forester, King Black Label. [59]

6. Browne Vintners Co., Inc. Period: Prior to December, 1953. Principal trade names: White Horse Scotch, Mumm's Champagne, Christopher, Columbus Rum.

7. American Distilling Co. Period: Throughout. Principal trade name: Meadwood.

8. James B. Beam Distilling Co. Period: Throughout. Principal trade names: Jim Beam, Colonel Jim Beal, Beam's Pin Bottle, Beam's Bond.

9. Glenmore Distilleries Co., Inc. Period: Throughout. Principal trade names: Kentucky Tavern, Glenmore's Silver Label, Old Thompson.

10. Old Joe Distillery. Period: May, 1952 to date. Principal trade name: Joe Louis.

11. Hiram Walker, Inc. Period: Throughout. Principal trade names: Imperial, Walker's Deluxe, Canadian Club, Walker's Gin, Hiram Walker's Cordials, Ten High, Meadowbrook Rye.

12. Bellows & Company. Period: Throughout.

Principal trade names: Bellow's Reserve, Partner's Choice, Bellow's Club Bourbon.

13. Julius Wile Sons & Co., Inc. Period: Throughout. Principal trade name: D.O.M., Garnier Cordials.

14. W. A. Haller Corporation. Period: March, 1952 to date. Principal trade names: Haller's Reserve, Haller's 89, Haller's Gin, Haller's County Fair, Haller's SRS.

15. J.T.S. Brown & Sons. Period: Throughout. Principal trade name: J.T.S. Brown.

16. Italian Swiss Colony. Period: Throughout. Principal trade name: Brandy, Wines. [60]

17. Park & Tilford Distillers Corporation. Period: Prior to July 21, 1952. Principal trade names: Park & Tilford Reserve, Kentucky Bred, Boothes Hi & Dry Gin, Booths House of Lords Gin, Vat 69 Scotch, Martell's Cognac, Harvey's Ports and Sherries.

18. Christian Bros. Period: Throughout. Principal trade name: Brandy, Wines.

19. Leroux & Co. Period: Throughout. Principal trade names: Complete line of Leroux cordials and brandy.

20. Beringer Bros. Period: Throughout. Principal trade names: Brandy, Wines.

21. Wentz Bros. Period: Throughout. Principal trade name: Wines.

22. Concannon Vintage Co. Period: Throughout. Principal trade name: Wines.

23. O. Riccadana Co. Period: Throughout. Principal trade name: Vermouths.

24. Tavi Co. Period: Throughout. Principal trade name: Vermouths.

25. Prunier Cie. Period: Throughout. Principal trade names: Prunier B & S Cognac, Prunier Hostellerie Cognac.

Mr. Ehrlich: (Continuing) There is one other thing: In response to your Interrogatory No. 21, we gave you an answer to the interrogatory as to your inventory of merchandise on hand. This goes as to the defense to count 2, and our records show that we had received this information from you contained in our answer to Interrogatory 21, and we would like to get that into the record without going through the originals.

Mr. Hutchinson: Well, I think we can accomplish that. [61] However, these inventory records, as I understand it, would be shown to relate to the first of the month and not to the 15th, and for that reason we would object to this particular information on the ground that it is incompetent, irrelevant and immaterial, and too remote to the time when the order of December 15, 1952, was placed and the time when it would have arrived, the inventory would be different, and that this does not show that.

Mr. Ehrlich: This shows the plaintiff's sales to retailers September, 1951, to February, 1952, that is, the preceding six months, which permits us to, we contend, reject your order on the basis of the average 45-day inventory.

Mr. Hutchinson: In order to save you time, and subject to the right to show an error if that should be the case, we would stipulate that so-called deple-

tion report, which shows what is outlined in parts A and B of the answer to Interrogatory No. 21, subject to our objection that there is no issue presented that the order was rejected nor any averment that the order was rejected for that reason.

Mr. Ehrlich: Then the reporter will copy A and B of the answer to Interrogatory 21.

Reporter's Note: Answer to Interrogatory No. 21:

(a) (b) Plaintiff's Sales to Retailers (Cases)
September, 1951-February, 1952 [62]

	Lord Calvert	Calvert Reserve	Calvert Gin
Sept. 1951	174	564	19
Oct. 1951	250	1009	90
Nov. 1951	147	469	14
Dec. 1951	341	766	32
Jan. 1952	206	409	20
Feb. 1952	39	116	9
	-----	-----	-----
	1157	3333	184
Average Monthly Sales	193	555½	31
45 Day Inventory	289½	833¼	46½
Plaintiff's Inventory			
December 15, 1952	242	893	87
Plaintiff's Order Dated			
Dec. 15, 1952	100	775	25
	-----	-----	-----
	342	1668	112

Mr. Hutchinson: We would like to offer certain answers of the plaintiff's interrogatories addressed to the defendant. Portions only of Answers No. 14—

Mr. Ehrlich: (Interposing) Will you take them one at a time so we can determine if we have any objections?

Mr. Hutchinson: Yes. Answer to Interrogatory 14,

page 4 of the Answers, commencing at line 28, and I will read it, if I may.

Mr. Ehrlich: Well, let me read it first and see if I have any objection.

Mr. Hutchinson: Very well. [63]

The Court: It is now 12:00 o'clock, gentlemen. You will have plenty of time to look into the matter so you won't be pressed in making up your mind.

Mr. Hutchinson: Very well.

Mr. Ehrlich: Well, would counsel give me now, before recess, the different answers he wants admitted? We can look into them during the noon hour. You say No. 14, line 28 to the end?

Mr. Hutchinson: And 15, line 20 to the end. Answer 19 on page 6 from the beginning to the word "notify" on line 16.

Mr. Ehrlich: That is all?

Mr. Hutchinson: Yes.

The Court: Take an adjournment to 2:00 o'clock.

(Thereupon this court was adjourned to the hour of 2:00 o'clock p.m.) [64]

Wednesday, January 16, 1957, 2:00 o'clock

Mr. Ehrlich: If the Court please, I have gone over the requests for stipulation as to some of the answers to interrogatories, and based on my legal position I regret I can't accommodate you because, of course, I will have to make specific objections if you seek to elicit that testimony.

Mr. Hutchinson: And you have particular reference to the portions of the——

Mr. Ehrlich: (Interposing) To the portions you

gave me. I reviewed them and my various objections go to many of the testimony under the circumstances here.

Mr. Hutchinson: There is no suggestion that the interrogatories and answers as indicated are incorrect?

Mr. Ehrlich: Oh, that isn't it. The question of proof doesn't enter into it. It is a question of our legal position, and to protect the record, as the Court suggested this morning.

Mr. Hutchinson: If the Court please, in that circumstance we will then offer with respect only to the First Cause of Action these portions of the answers of defendant to plaintiff's interrogatories 14, 15 and 19. I will read them.

Mr. Ehrlich: Pardon me. Should we make our objection before they go into the record, your Honor, or would your [65] Honor rather have them read? This way I don't like the answers to go into the record. Normally you would have a witness on the stand and propound a question to him, and then I could make a timely objection before the contents went into the record, and your Honor would make a ruling.

The Court: This is the answer, is it?

Mr. Hutchinson: Yes. This is part of the discovery proceedings, your Honor, and these are verified answers to interrogatories propounded to the defendant. I believe they are a part of the record.

The Court: I will allow them subject to your motion to strike and over your objection.

Mr. Ehrlich: May I make my objection prior to the reading of them?

The Court: You may.

Mr. Ehrlich: If your Honor please, I object to the introduction of the particular portions of the answers to the interrogatories which Counsel has just specified. I won't argue them at this time. I will just make the objection on the ground that the contract is illegal and void, in violation of the Constitution and public policy and the Alcoholic Beverage Control Act of the State of California. And count one states no claim for relief.

The second objection is that count one states no claim for relief. [66]

The third objection, count three does not state a claim for relief.

Next objection, that the testimony is incompetent, irrelevant and immaterial.

The next objection, that the testimony will not prove any of the issues or any material fact.

The next objection is that the admission of this type of testimony would violate the parole evidence rule in that it seeks to vary the terms of a written instrument by oral testimony; that it violates the provisions of Section 1638, 39 and 1698 of the Civil Code and 1658 of the Code of Civil Procedure.

And finally, two objections: No proper foundation has been laid for any oral testimony with respect to the written contract, and the final objection that paragraph 16 provides that it can only be modified by written agreement.

The Court: I am not familiar with the offer

which Counsel has made. Has it to do with oral testimony in relation to the contract?

Mr. Ehrlich: That is what it has, your Honor.

The Court: I will give you an opportunity to be heard.

Mr. Hutchinson: Yes, your Honor, if I may briefly respond to Counsel's objections as I hastily noted them.

First, as indicated, this is being offered exclusively with regard to the first cause of action. It is being [67] specifically offered to show conduct of the defendant, or Calvert that is, as its predecessor was at that time, and for the limited and exclusive purpose of aiding the Court to interpret the word "promote".

The Court: I will have no difficulty doing that at all. It is a commonplace word. It speaks for itself.

Mr. Hutchinson: I believe, if your Honor please, that in any particular field the word may have a significance different than others.

The Court: Yes, I understand.

Mr. Hutchinson: And our purpose was to place this in the record for that purpose.

The Court: In any event, in the interest of time, so that both sides are protected by a record, I will allow it to go in subject to motion to strike and over your objection, then we can get it directly so there will be no question about it.

Mr. Hutchinson: Thank you, your Honor. The portions indicated are, first, page four commencing at line 28 in the answer to interrogatory fourteen

propounded to the defendant by the plaintiff, as follows:

“Defendant employs and has employed during the period January 1, 1952, to date persons known as ‘specialty men’, sometimes called ‘missionary men’. These employees are authorized to call upon retailers of alcoholic beverages within [68] the counties of Alameda and Contra Costa, State of California, only for the purpose of promoting the sales of the defendant’s product.”

And the following from the answer of the defendant to plaintiff’s interrogatory number fifteen on page 5 of defendant’s answers, commencing at line 20 through line 25, as follows:

“‘Specialty men’ employed by defendant during the period January 1, 1952, to date were and are instructed that if in the course of their promotional work a retailer indicates that he desires to purchase defendant’s products, that information is to be passed along to the wholesaler of the retailer’s choice.”

And the following from defendant’s answer to plaintiff’s interrogatory number nineteen, appearing on page 6 of the answers, lines 11 through 16:

“If in the course of their promotional work defendant’s ‘specialty men’ discovered that a retailer desired to purchase defendant’s products, they would ask the retailer for the name of the distributor with whom the retailer desired to do business. After the retailer had designated a distributor, the distributor selected would be notified.”

Now, your Honor, I would like call on Mr. Lind for a question or two.

Mr. Ehrlich: If your Honor please, I will [69] preserve my right to strike until the end of the plaintiff's case, and then make my various motions and the motion to strike.

The Court: Very well.

FREDERICK J. LIND

called as a Witness on behalf of the Plaintiff, being first duly sworn, testified as follows:

The Court: Your full name, please.

A. Frederick J. Lind—L-i-n-d.

The Court: Where do you live, Mr. Lind?

A. In Old Greenwich, Connecticut.

The Court: And your business or profession?

A. I am an attorney. I am a lawyer, sir.

The Court: Take the witness.

Direct Examination

Q. (By Mr. Hutchinson): Mr. Lind, I believe you are and for a number of years have been employed as an attorney, at least from time to time, by the present defendant in this action and formerly by its predecessor, Calvert Distillery Corporation, is that correct? A. That is correct.

Mr. Hutchinson: If the Court please, we would like to examine this witness as an adverse witness.

The Court: Let the record so show.

Q. (By Mr. Hutchinson): Mr. Lind, in connection with your professional work on behalf of the defendant, and formerly [70] for Calvert, did

(Testimony of Frederick J. Lind.)

you have occasion to review or draw contracts used by the defendant and Calvert in dealing with its distributors and others? A. I have.

Mr. Ehrlich: If your Honor please, may I have the objection I have heretofore made to all this line of testimony without having to repeat it?

The Court: Let the record so show.

Q. (By Mr. Hutchinson): Now, Mr. Lind, in connection with the contracts of Calvert Distillery Corporation you have had occasion, have you not, to examine paragraph eleven of the contract which has been introduced in evidence as plaintiff's Exhibit 1 in this case? A. I have.

Q. Did you have acquaintance and do you have now a recollection as to paragraph 11 of a similar printed contract prepared for Calvert which was entered into with one or more distributors during the year 1953?

Mr. Ehrlich: If your Honor please, I would like to make a special objection to that. The fact that this defendant may have changed its contract once or ten times has nothing to do with or has any competency or relevancy or materiality as to the construction which this Court will give to this contract. We may have changed it for any number of reasons, and the fact that it has been changed has no place in this litigation [71] whatsoever.

Mr. Hutchinson: If the Court please, our purpose is to show conduct of the parties as interpreting a contract contrary to their position taken in this action. A typical admission type of action.

(Testimony of Frederick J. Lind.)

Mr. Ehrlich: That isn't a true statement. That is not an interpretation of this contract before the Court. You are now asking this witness about some other contracts that have been drafted. It has nothing to do with the exhibit attached to the complaint. He is asking for future contracts. We may have had ten since then. How could that aid your Honor in your interpretation of that provision of the contract? I submit my objection.

Mr. Hutchinson: We are talking about the immediately succeeding period, your Honor, in which that portion was changed to provide, as we see it, for the thing they now argue for here with regard to the earlier contract, wording.

The Court: What relation has the earlier contract to this contract in question here?

Mr. Hutchinson: This is the kind of contract that Calvert prepared immediately following the one in question.

The Court: The objection will have to be sustained.

Mr. Hutchinson: May I make a statement of what I expect the witness, if permitted to testify, would have said in that regard, your Honor, in the form of an offer? [72]

The Court: Now you have made your offer of proof, or attempted to, and I have ruled on it. That is a complete record.

Mr. Hutchinson: But I wanted to indicate the specific change that occurred, your Honor.

(Testimony of Frederick J. Lind.)

The Court: But I sustained the objection.

Mr. Hutchinson: I appreciate that.

The Court: Now you want to what?

Mr. Hutchinson: I simply want to make an offer as to what I expect this witness would testify to, in order that it may be in the record what we hoped to prove by this witness.

The Court: What you hope to prove?

Mr. Hutchinson: By this witness, that he would testify that for the year 1955—

The Court: Just a moment. Ask another question and I will rule on it so you will have a record.

Mr. Hutchinson: Very well.

Q. (By Mr. Hutchinson): Mr. Lind, in the case of the 1953 purchase form of contract for Calverts, is it not a fact that paragraph 11 of that contract in that year read as follows:

“This contract shall be effective for a period of blank years”—in the printed form from March blank, 1953. “If distributor desires to renew the contract, he shall apply for renewal not less than thirty days before March 1, 1954”?

Mr. Ehrlich: I renew my objection your Honor, on the [73] ground that what some future contract may contain has no relevancy or materiality and can in no way aid your Honor in your interpretation of the plain provisions of this contract.

This contract with its clause, with its provisions, is before your Honor. It is a matter of law. There is no evidence admissible of any kind. It is a plain, simple contract, as your Honor said this morning.

(Testimony of Frederick J. Lind.)

What we did subsequently or previously is no concern of this court. Your Honor has this before you, so I renew my objection as to the competency, relevancy and materiality.

The Court: Matter submitted?

Mr. Hutchinson: I think we argued the matter, your Honor. I wanted to complete the offer. I am confident it is proper interpretive evidence.

The Court: Objection will be sustained.

Mr. Hutchinson: I have no further questions of Mr. Lind. Thank you, sir.

Mr. Ehrlich: No questions.

Mr. Hutchinson: I will call Mr. Lewis, please.

FRANKLIN LEWIS

called as a Witness on behalf of the Plaintiff, being first dully sworn, testified as follows:

The Court: Your full name, please.

A. Franklin Lewis.

The Court: Where do you live, Mr. Lewis? [74]

A. 2160 Vicksburg Avenue, Oakland.

The Court: Your business or occupation?

A. Salesman.

The Court: Proceed.

Direct Examination

Q. (By Mr. Hutchinson): Mr. Lewis, what is your business or occupation?

A. I am a salesman.

Q. How long have you been engaged in sales work?

A. Approximately twelve years.

(Testimony of Franklin Lewis.)

Q. Were you formerly employed by Calvert Distillery Corporation? A. Yes.

The Court: Speak up so the reporter can hear you. A. Yes, sir.

Q. (By Mr. Hutchinson): You have received a subpoena to appear in this action, have you?

A. Yes.

Mr. Hutchinson: If the court please, in view of the witness' former employment by the predecessor of the defendant, we would like to conduct this examination as an adverse witness.

Mr. Ehrlich: He is not the type of executive that comes under 2055, so we object on the ground that he doesn't come within the provision of the Code. If Mr. Hutchinson desires [75] to question him, he must question him as his own witness. He is a salesman, formerly a salesman for Calvert, and that isn't in the designations provided in the Code.

Mr. Hutchinson: If the Court please, I believe that Section 2055, Code of Civil Procedure, is a purely procedural step. Futhermore, I have just been advised—May I have one question on voir dire of this witness?

The Court: Surely.

Mr. Ehrlich: Were you discharged by Calvert?

The Witness: Yes, I was.

Mr. Hutchinson: We will object to that on voir dire.

Mr. Ehrlich: So he can't be an adverse witness after he has been discharged—further ground of objection.

(Testimony of Franklin Lewis.)

Mr. Hutchinson: If the Court please, the question on that, at least, the highest court in California has held the question is when the transactions occurred concerning a person employed by the opposing party and not when he appears as a witness. In other words, former employees of the opposing party—

The Court: (Interposing) But he has been discharged.

Mr. Hutchinson: Yes, but the rule seems to be, whether or not they are adverse, seems to be whether they occupied the position at the time of the transactions, and not at the time of testimony. I can cite your Honor a quite recent California case on that point which I think is persuasive if not [76] controlling.

Mr. Ehrlich: I haven't the code section here, your Honor, but I am satisfied that it specifies specifically the executive—if we have the code, I think we could settle this in a minute.

The Court: Have you got the code here, Counsel?

Mr. Hutchinson: I don't have the code of civil procedure, no, your Honor.

The Court: Get me the code of civil procedure. What objection do you have to questioning this witness as your own witness?

Mr. Hutchinson: I can quite conceivably have him testify. His testimony would be the same either way. The question of being an adverse witness, naturally we can direct our questions by leading

(Testimony of Franklin Lewis.)

questions and save a great deal of time, among other things.

Also, if as Counsel suggests they wish to make some point they have in mind of what this gentleman as a manager did, we would prefer to have it as an adverse witness so that we are free to reject it if need be.

The Court: Under the conditions now and the showing made I am inclined to agree with Counsel, so you may get any law that you have to the contrary.

Mr. Hutchinson: I believe I have a note of cases that so hold. There is a California case. I don't recall the [77] federal courts so holding.

The Court: I suggest that you withdraw this witness and call your next witness so that you will have an opportunity.

Mr. Hutchinson: I think, your Honor, the examination will go in in the same manner, so rather than take the Court's time, I will proceed.

Q. (By Mr. Hutchinson): During what period of time did you work for Calverts Distilling Corporation, Mr. Lind?

A. From February, 1947, to October 14th, 1956.

Q. During that time did you have any geographical area in which you were directed to work?

A. Yes, I did.

Q. And what was the area in which you did work?

A. Well, the first year or so that I was with the distillery I didn't work locally. I was doing public

(Testimony of Franklin Lewis.)

relations work completely and travelling with a film.

I worked from Bakersfield to the Oregon line, and I worked northern Nevada, all of northern California. But I was assigned a territory and the territory was—originally it included Richmond, El Cerrito, Albany, Emeryville, Berkeley, metropolitan Oakland as far as Lake Merritt, Alameda. Then when Calvert hired additional manpower Richmond was eliminated from my territory. I still worked geographically as far as Lake Merritt, continued to work El Cerrito, Albany, Emeryville, [78] and the remainder of them.

Q. Now, during that time when you were working in the East Bay were you directed to work with any of the distributors who handled Calvert's products? A. Yes, sir.

Q. In that connection did you deal with the Key Distributing Company, a division of J. C. Millett Company, the plaintiff here? A. Yes.

Q. Can you tell us very briefly how you worked on behalf of your company, Calvert, with the Key Distributing branch insofar as the two were working together?

Mr. Ehrlich: Wait a minute. We make the same objection that we have heretofore raised to this question. We have the written agreement. It speaks for itself. Your Honor has stated the word "promote" is a plain, simple English word and you understand what that means. This is purely directed to the contract here, which needs no interpretation from this witness.

(Testimony of Franklin Lewis.)

And by the way, I might just point out in passing that Rule 43 of the Federal Rules says that a party—this is your rules, your Honor—a party may call an adverse party or an officer, director or managing agent of a public or private corporation. I didn't know at the time that the federal rules had a limitation as to officer, director, managing agent of [79] a public or private corporation.

Mr. Hutchinson: As to Counsel's first objection, if it was one, we are not trying to interpret the contract. We are trying to show what was done and whether it conformed with the contract or whether it was a breach.

The Court: Reframe your question so that I may follow it. I didn't follow it clearly.

Mr. Hutchinson: Yes, your Honor. Our purpose here—

The Court: No, reframe your question.

Mr. Hutchinson: Oh, yes. Would you like the reporter to read it, or I can restate it?

The Court: I suggest you restate the question.

Q. (By Mr. Hutchinson): In carrying out your work for Calvert Distillery Corporation, Mr. Lewis, can you tell us just what you did insofar as your dealings, your personal dealings, with the Key Distributing branch of the plaintiff, J. C. Millett.

Mr. Ehrlich: We object on the grounds it is incompetent, irrelevant and immaterial what this man did in connection with his activities for Calvert Distillers.

He has pleaded here that we breached the con-

(Testimony of Franklin Lewis.)

tract because we failed to turn over to the plaintiff the retailers whom we solicited and took orders for, and his activities under the contract are of no concern. The only damage under the first count arises out of our failure to turn over to [80] him—I will read it: “By reason of the facts stated and by reason of the failure, neglect and refusal by defendant to submit to Key Distributing orders solicited and obtained by salesmen of the defendant according to the terms of said implied condition of the agreement plaintiff has suffered damages in the sum of twenty-five thousand dollars.”

So the other activities are not at issue in the case, or any other activities. And of course that is the illegal activity that they are basing their damages on.

The Court: For the purpose of the record, what is the purpose of this offer?

Mr. Hutchinson: The purpose of this offer, your Honor, is to show that under the provision of the contract requiring Calvert to promote its products in support of the plaintiff this man was assigned to that work.

The Court: For that limited purpose I will allow it.

Mr. Hutchinson: Thank you.

Q. (By Mr. Hutchinson): Do you remember the question?

A. I would like to hear the question repeated.

Q. The question very briefly is, without changing it if I can word it as Counsel wants to retain his

(Testimony of Franklin Lewis.)

same objection and rulings, will you tell us briefly what you did in conjunction with your work for your employer, Calvert, in dealing with the Key Distributing branch of the plaintiff.

Mr. Ehrlich: May I have all my original [81] objections, your Honor?

The Court: The record so shows.

Mr. Hutchinson: That is the understanding.

The Witness: Shall I answer?

Mr. Hutchinson: Yes.

The Witness: A. My work consisted of promoting the sale of Calvert merchandise by placing point of sale material; showing our newspaper, magazine, billboard and card programs; to tell the Calvert story.

We had a story to tell at the time about the merits of our merchandise over and above the competition's merchandise. To work with the wholesale people. To, as we called it, "high spot" with them when they felt that they would like to sell our merchandise against competitive labels, particularly at the bar level. I am talking now in terms of plus business or what we call—

The Court: (Interposing) I didn't follow that "high spot".

A. "High spot" merely means, your Honor, that at the request of the wholesale salesman, if he has a specific call—for example, for me to make a specific appointment with him, make a call and tell my story as against whatever we are trying to sell against. The wholesale man consummates the sale

(Testimony of Franklin Lewis.)

if he is able to. I contribute what I think I can.

We have had many such requests all through the years [82] from our wholesalers. I started with Calvert when we had a multiple wholesale arrangement. As I say, my job was to promote the sale of Calvert merchandise, help the wholesale people in any possible way that I could.

Mr. Ehrlich: I move to strike the answer on the grounds heretofore stated.

The Court: The motion will be denied.

Q. (By Mr. Hutchinson): Now, did you occasionally or regularly call on the plaintiff's Key Distributing branch to inquire whether any assistance was needed by you on a particular day or at any other time.

Mr. Ehrlich: Same objection, your Honor.

The Court: Same ruling.

The Witness: Should I answer?

The Court: You may answer.

The Witness: Well, during most of the time that we had the dual arrangement with Key and Julliard, I worked up at the Julliard House, but also worked with the two people periodically when my geographic area was the area in which they worked.

In other words, we had another man that was geographically assigned to the East Oakland area, working out into the other outlying areas. He was known there. I was known west of the lake. Consequently, he was of little value to the Key people of my side of the city and in the area that I [83] had covered for years, so the Key people would

(Testimony of Franklin Lewis.)

ask me to high-spot those specifics with them, at their request, which I did.

Q. In that connection, did you have occasion to furnish, on behalf of your employer, so-called point-of-sale material to the chief branch or the retailer?

Mr. Ehrlich: Same objection, your Honor.

The Court: Same ruling.

A. Yes.

Q. (By Mr. Hutchinson): Could you tell us very briefly what you mean by "point-of-sale material"?

A. Point-of-sale material—

Mr. Ehrlich: Same objection.

The Court: You have your objection running to all this testimony.

Mr. Ehrlich: Thank you.

The Witness: Point-of-sale material is designed to promote the sale of ours and anyone else's merchandise. I mean, that applies, of course, to the whiskey business, and it applies to any merchandise or any product, at the point of sale or as near the point of sale as possible. To illustrate, it probably could be a counter-piece, a package outlay, it could be a floor piece, it could be anything that would help promote the sale of our goods.

Q. (By Mr. Hutchinson): Essentially the point-of-sale material, if I understand you, was a rack or sign to attract [84] attention.

A. That's right.

Q. Now, in calling on retailers, did you, as part of your work for Calvert, call on retailers who were purchasing or not purchasing Calvert's products to

(Testimony of Franklin Lewis.)

see if anything could be done to promote that production, independently of any particular wholesaler's previous appointment? Do you understand what I mean?

A. I want to be sure I understand.

Q. Well, perhaps I can make it very short. Did you occasionally or regularly call on retailers, licensees as they are called, without being accompanied at the time by a wholesaler from the sales force?

A. Yes.

Q. In that connection, did you call for the purpose of presenting such point-of-sale material?

A. That and specific approach to whatever our particular promotion was at that time of the year, and try to increase the sale of our goods.

Q. And in that connection would you review with the retailer the inventory of Calvert and Carstair products? A. Oh, yes.

Mr. Ehrlich: Same objection, your Honor.

The Court: What was that?

Mr. Ehrlich: Whether he reviewed the [85] retailer's inventory.

The Court: It will go out. Objection sustained.

Mr. Hutchinson: Q. Did you look at the retailer's inventory in making such calls to see whether there were any Calvert and Carstair brands?

A. Yes.

Q. And if you found Calvert's, did you look at the inventory to see whether they were out of one size or the supply was short for anything?

A. Naturally. That's elementary. Not only that,

(Testimony of Franklin Lewis.)

but as you call on the trade through the years, as you become better acquainted with them, you pretty well know what is in the back room. I mean by that, your Honor, how much of our merchandise they have on hand, give or take a bottle, so that we know when it is time to try to encourage the sale of additional merchandise by our wholesalers.

I am not talking in terms of just shelf stock, but if you know your account well enough, you have a pretty good idea, allowing that you will miss by a case or so. And generally you have access to the back room, and if there is something in the back room that you want—our job is to get it out on the floor where it can be seen.

The Court: I wouldn't think they would take that much of a chance.

The Witness: Oh, yes, your Honor, in some instances. [86]

Mr. Hutchinson: Q. Now, in dealing with retailers are there two general types of retailer purchasers?

A. Yes, there is the package outlet and the bar outlet.

Q. Now, to take the package—

The Court: Pardon me, just so I follow this testimony. What is there in the contract with relation to promotion?

Mr. Ehrlich: I will read it to your Honor. I read from paragraph 6.

“Calvert agrees to promote the sale of its products and to advertise its products in a manner con-

(Testimony of Franklin Lewis.)

sistent with the type of merchandise and cases sold. Calvert shall have the sole right to determine the amount of sales promotion and advertising and the media used for advertising.”

I have just let this go on, your Honor, but I don't see any competency or relevancy to it.

The Court: And the purpose for this testimony, so the record will be clear, is what?

Mr. Hutchinson: To show how promotion was carried out, your Honor, and then the next step will be to show how it was shut off arbitrarily, in support of our First Cause of Action.

Mr. Ehrlich: But that isn't what they are suing for, your Honor.

Mr. Hutchinson: Yes, it is.

Mr. Ehrlich: No, it is here specifically in your own [87] language, counsel: “By reason of the facts hereinbefore stated, and particularly by reason of the failure, neglect and refusal by defendant to submit to Key Distributing Company orders solicited and obtained by salesmen of the defendant in the counties of Alameda and Contra Costa.” There is not a word in the contract requiring us to do this. This is the oral agreement they are trying now to superimpose upon this written contract, and that is why I have made these very specific objections to this.

The Court: If there is any objection to this line of testimony, in the interests of time I think we will go along and get the record so that you don't waive any of your legal rights. Let's proceed.

(Testimony of Franklin Lewis.)

Mr. Hutchinson: Q. I believe, Mr. Lewis, you stated that there were package houses and the on-sale establishments. A. Yes.

Q. Now, in the case of a package house, is there any preferred petition for particular merchandise for the purpose of sale to the consumer?

A. Yes.

Q. Do I understand that the way it is displayed on the shelves or in the windows or in the center of the floor has an effect upon the purchasers seeing it and demanding it?

A. All of that contributes to sale.

Q. And that was one of the functions with which you aided [88] the wholesalers or distributors, arranging suitable places for these things.

A. That is true.

Q. Now, in the so called bar accounts, was there any preferential type of distribution possible there? In other words, what was the most desirable kind of display for use of the merchandise in the bar accounts? A. Well, again, eye level.

Q. I beg your pardon.

A. Eye level at the back bar. At the level of your eyes, or as close to it as possible as you are sitting on a stool, to attract your attention. Well, for example, you try to get a bottle of Lord Calvert where it can be seen, or where possibly an impulse might indicate that you might order that over and above something else.

Q. Now, with regard to the resale by the retailer, the bar account, was there any name given to

(Testimony of Franklin Lewis.)

the volume of sales, the kind of thing that would be served if no specification were given by the particular customer? I think it is called "pouring whiskey" or "pouring gin", or whatever, is that it?

A. That is correct.

Q. So that if you could induce, for example, the bar owner to serve Calverts whenever someone asked for bourbon, that would account for the major sales in that establishment of bourbon? [89]

A. That is right.

Q. Did you attempt to aid the wholesaler in securing a pouring account for Calverts and Carstairs products? A. Indeed I did.

Q. Now, in your independent calls on retailers what happened, if it did happen, when the retailer needed some further Calvert products to complete his stock or, if he didn't have any, to install the item in his place? What would you do if you found that situation?

A. You mean what I did leading up to the actual sale, which I cannot write?

Q. That is right.

A. Allowing that there was any appreciable quantity, contact the wholesaler specified by the retailer, and he would consummate the sale if possible either with the help of the specialty man or by himself.

Q. Now, you did that, did you, or did you not?

A. Yes, indeed I did.

Q. Were you in general instructed to carry out

(Testimony of Franklin Lewis.)

the activities you have described by your superiors?

A. Yes.

Q. Who was your immediate superior in the East Bay at that time in the Calvert organization?

A. Well, I had no immediate superior in the East Bay then, but in the district the offices were on Montgomery Street in [90] San Francisco. My immediate superior was Bernard Garfield.

Q. He was the man you reported to and considered your superior, is that right?

A. That is correct.

Q. Now, with relation to the summer of 1952, June or July, was there any change made in your activities on behalf of Calvert in those things that you have been describing?

A. Yes, there was.

Q. Did that all come about by reason of something said to you by Calvert personnel?

A. Yes.

Q. Was this at a meeting of some kind?

A. Yes. The specific meetings were—well, you see, this didn't concern but two people, actually. There were only two of us working in my area that would be affected by this particular thing.

Q. I see. Who talked to you about some change that was going to happen in the East Bay so far as Calvert promotion was concerned?

A. The specific times?

Q. Yes. I am thinking now of the year 1952, around mid-year.

A. Mr. Garfield and Mr. Taube.

(Testimony of Franklin Lewis.)

Q. Who is Mr. Taube?

A. Mr. Taube at that time was division manager for the western division. [91]

The Court: Did you have a conversation with him? A. Yes, sir.

The Court: Who was present?

A. At that particular time? No one.

The Court: Where was this?

A. Well, it was in the district office in San Francisco.

The Court: Morning or afternoon?

A. I don't recall, your Honor. That is five years ago.

The Court: Proceed.

Mr. Hutchinson: Q. So that there was yourself, Mr. Taube and Mr. Garfield at that time, is that correct?

A. Thereabouts. I say no specific time, but I have had conversations with both of them.

Q. With regard to the first conversation you had on the subject of some change in the way you would carry out your work, was Mr. Taube present?

A. I beg your pardon?

Q. The first time this subject was discussed was Mr. Taube present? A. No.

Q. Then the conversation was between you and Mr. Garfield. A. That is correct.

Q. Now, in this conversation, would you give us the approximate date?

A. Well, it was coming up to our summer WWW promotion, [92] which was a very heavy, or

(Testimony of Franklin Lewis.)

was at that time, a very heavy promotion of the Calvert organization.

Q. What time of year did that usually relate to?

A. During the summer months, June, July and part of August, I think.

Mr. Ehrlich: Is this 1952?

A. Yes.

Mr. Hutchinson: Q. What, if anything, was said with regard to promotions by you in your work in the Key Distributing Branch of the plaintiff?

Mr. Ehrlich: Your Honor please, I again want to renew my objection heretofore made, and call to your Honor's attention we are not concerned with anything but the alleged damage arising out of our failure to solicit and deliver to them orders which we received from the retailers, whom it was illegal for us to contact.

Mr. Hutchinson: I think we have been over that before, your Honor. We are trying to show that they ceased to do the promotion work that they had been doing on behalf of this distributor and all the others they had in the Key area.

Mr. Ehrlich: That isn't the charge in the complaint.

Mr. Hutchinson: Yes, it is.

Mr. Ehrlich: I again read to your Honor that count one is explicitly restricted—I don't want to be redundant about it, but here is what they say again: [93]

“By reason of the facts hereinbefore stated, and particularly by reason of the failure, neglect and

(Testimony of Franklin Lewis.)

refusal by defendant to submit to Key Distributing Company orders solicited and obtained by the salesmen of defendant within the counties of Alameda and Contra Costa for delivery according to the terms of said implied conditions of said agreement, the plaintiff has been damaged in an amount estimated at \$25,000.”

There is not one word in the first count or in any portion of this complaint having reference to any so called promotion work except this illegal condition and this contractual obligation which they are trying to superimpose on this contract. So whatever we did, assuming we breached the contract in other aspects of promotion work, the only thing they complain about and the only one they plead in this complaint is this illegal one of soliciting orders and failing to turn them over for delivery. Nothing else is complained about.

Mr. Hutchinson: If the court please, the complaint in part reads:

“One of the conditions of the said written agreement was that the defendant agreed to promote the sale of its products by continuing to employ salesmen sometimes known as ‘specialty men’ within the counties of Alameda and Contra Costa in the manner and for the purpose specified above.”, and so on.

Mr. Ehrlich: Go on, read on. “and submit the orders so solicited and obtained”. [94]

Mr. Hutchinson: We allege they agreed to promote the sales by use of these men, and that they

(Testimony of Franklin Lewis.)

did continue to employ them, but diverted the fruits of their work, orders of which they were informed, et cetera, to the competitors and not to our people.

Mr. Ehrlich: And the only allegation of damage which you allege is allegation ten, by reason of our failure to turn over orders solicited and obtained you suffered damages. There is no other statement of any violation of any provision of the so called promotional activity. There is not one word in your complaint regarding any promotional activity except this alleged implied oral agreement on our part.

Mr. Hutchinson: In any case, we have a right to prove what we have alleged, I hope. I think we have been over this ground enough, your Honor. We would like to continue the examination.

The Court: I will allow this testimony subject to your motion to strike and over your objection.

Mr. Hutchinson: Could you read the question, Mr. Reporter?

(Thereupon read: "What, if anything was said with regard to promotions by you in your work in the Key Distributing Branch of the plaintiff"?)

Mr. Hutchinson: Q. Do you understand the question? A. I think so.

Q. Go ahead and answer it. [95]

The Witness: Are you objecting to this?

The Court: Don't you worry about his objections. He will take care of himself.

The Witness: A. I was told specifically—there

(Testimony of Franklin Lewis.)

was another man involved in this, too. We were both told to withdraw all support to Key Distributing Company and not even to put—this isn't a direct quote, but it is as close as I can remember—not even to put our foot in the door.

Mr. Hutchinson: Who was the other man who was involved in this?

A. A man named Joseph Fischer.

Q. Was he a Calvert employee?

A. Yes, and still is.

Q. He is the man you referred to as working beyond Lake Merritt?

A. That is right. Fischer—F-i-s-c-h-e-r.

Q. Was he present when this statement was made to you?

A. I think so. As nearly as I can remember, this was made to us several times.

Q. On some occasions Mr. Taube, the western manager, was present when these statements were made?

A. Well, at least once.

Q. Approximately what time was that?

A. I don't know.

Q. After you were so directed by Mr. Garfield, and either [96] Mr. Taube or Mr. Garfield in Mr. Taube's presence, did you then give any assistance to Key Distributing branch of the plaintiff?

A. None whatever.

Q. In the event a retailer appeared in need or expressed a desire to purchase Calvert products, what if anything were you instructed to say to him in that connection?

(Testimony of Franklin Lewis.)

A. Well merely,—I mean, it's a trick of the trade. It's a way to emphasize one and de-emphasize the other, and over the years you know how to do that.

Q. And you were so instructed?

A. That is correct.

Q. And after this time, in the month of June or July of 1952, until the end of the year did you go to the Key Distributing branch of the plaintiff in connection with your work for Calvert?

A. As everything else at Calvert, they signed the check. I did what they told me to do. I don't think I even walked inside the door.

Q. And you gave no help whatever?

A. None whatever.

Q. Did you have any opportunity to observe what Mr. Fischer did, he apparently also following these instructions.

Mr. Ehrlich: We object to that as hearsay.

The Witness: It isn't hearsay. [97]

Mr. Ehrlich: Well, I ask that that go out.

The Court: It may go out.

Mr. Ehrlich: It seems we have got another lawyer in the case.

The Court: Better let me take care of that.

The Witness: I am sorry, your Honor.

Mr. Ehrlich: As to what Mr. Fischer did, Mr. Fischer is the best evidence.

The Court: Objection sustained.

Mr. Hutchinson: Q. Do you recall how the Key Distributing branch of the plaintiff functioned or

(Testimony of Franklin Lewis.)

performed as a Calvert distributor, in other words, whether it was substantial or otherwise prior to this conversation with Mr. Garfield and Mr. Taube.

Mr. Ehrlich: I object to that as incompetent, irrelevant and immaterial, and calling for a conclusion of the witness. The sales themselves would be the best evidence of whether they were or were not substantial.

Mr. Hutchinson: Well, I wouldn't know whether they were substantial for that kind of operation or not. This witness, I think, is qualified to say whether they were good distributors or bad, whether they hold little or much as distributors go.

The Court: Do you know how much they sold?

The Witness: A. I had access to the figures at that [98] time, and did over some years, and they consistently outsold other wholesalers by possibly——

Mr. Ehrlich: We object to—pardon me.

The Court: Do you see how indefinite that is?

The Witness: Well, I would suggest possibly the figures are available.

The Court: The objection will be sustained.

Mr. Ehrlich: We ask that this go out, your Honor.

The Court: It may go out.

Mr. Hutchinson: Q. Did you have occasion to report at any time prior to the conversation with Mr. Garfield or Mr. Taube in June or July of 1952 as to whether Key Distributing should be continued

(Testimony of Franklin Lewis.)

or discontinued because of its performance or anything of that nature?

Mr. Ehrlich: We object to that as incompetent, irrelevant and immaterial, what this witness' opinion was of our business activities, and whether or not he reported it, and all the other grounds of objection that I have made.

Mr. Hutchinson: I am asking whether he reported it. He was on the ground and he would make reports, obviously, whether he reported whether they were good, or bad.

The Court: Did you make any report in that regard?

A. Well, we——

The Court: Did you or did you not?

A. You mean in my opinion were they good or bad? [99]

The Court: Yes.

A. I think they were excellent.

Mr. Ehrlich: I ask that that go out.

The Court: That may go out, we are concerned with the report.

A. Specific reports in writing, your Honor?

The Court: I don't know what it is.

A. Well, yes, many times I am sure I said they were excellent jobbers.

Mr. Ehrlich: We ask that that go out.

The Court: It may go out, an opinion and conclusion of the witness.

Mr. Hutchinson: Do I understand that the question might be asked as to what he did report liter-

(Testimony of Franklin Lewis.)

ally? Well, I will put the question and we can have.

Mr. Hutchinson: Q. Mr. Lewis, did you report to your superiors either orally or in writing what you observed by way of the activities in distributing Calverts to the distributor in your work with the distributors, including Key Distributors?

A. I am sure that I did. We used to submit daily reports.

Q. You submitted to your superiors a daily report? A. Yes.

Q. That was in writing? A. Yes.

Q. And you had other types of reports, also?

A. Yes.

Q. Now, in both reports did you at any time report that Key Distributing was not performing, or performing, or anything of that nature?

Mr. Ehrlich: In addition to my objections, I raise the objection that the reports are the best evidence.

Mr. Hutchinson: You have control of the reports. If you will produce them we will offer them.

Mr. Ehrlich: You have never made any demand until this minute for them.

The Court: In the interest of time I will allow it subject to the motion to strike.

Mr. Hutchinson: Q. Do you recall the question, Mr. Lewis?

A. I would like to have it repeated.

Mr. Hutchinson: Will you read the question, Mr. Reporter, please?

(Question read by the Reporter.)

(Testimony of Franklin Lewis.)

A. I don't recall ever reporting that they were not performing.

Mr. Hutchinson: Q. Do you have any present recollection of the rate of sales by the Key Distributing branch of the plaintiff of Calvert products during 1952 and prior to the time your efforts were changed by Mr. Garfield and Mr. Taube in this conversation?

A. Do I have any recollection of specific——

Q. Yes, in scores, hundreds, or thousands of cases per month.

A. No. Merely that they outsold Julliard.

Mr. Ehrlich: We ask that this voluntary statement go out. A hostile witness giving testimony to injure us if he can.

Mr. Hutchinson: I think that is out of order and, your Honor, I would like to assign it as misconduct. There is no occasion to abuse this witness.

The Court: Do you know what the answer was?

Mr. Hutchinson: You mean the witness?

The Court: Yes.

Mr. Hutchinson: He said they outsold Julliard.

The Court: He said "no". Didn't you?

The Witness: A. I have no figures.

The Court: That was your answer. How did you answer? You answered "no", did you not?

A. I believe I did.

The Court: Yes. Let's proceed.

Mr. Hutchinson: But Mr. Ehrlich's remark was——

Mr. Ehrlich: (Interposing) He made the state-

(Testimony of Franklin Lewis.)

ment that they outsold Julliard, which was not called for by the question.

Mr. Hutchinson: That is probably the only way that anybody connected with Calvert—

The Court: (Interposing) If you gentlemen aren't careful [102] I will become nervous. Let's proceed with this case.

Mr. Ehrlich: Sorry, your Honor.

Mr. Hutchinson: I am sorry, your Honor. You may cross examine.

Mr. Ehrlich: Should I make my motion now or reserve it to the end of the case?

The Court: Reserve it.

Mr. Ehrlich: Very well. No cross examination.

The Court: Step down.

Mr. Ehrlich: Oh, by the way, how many Calvert distributors were there in Alameda and Contra Costa counties in March of 1952.

A. Well, I think there were two.

Mr. Ehrlich: No questions.

The Court: Step down.

Mr. Hutchinson: Could you name those two?

A. Julliard and Key.

(Witness excused.)

The Court: Call your next witness.

Mr. Hutchinson: If your Honor please, our next witness will essentially go to the question of damages.

The Court: Better reserve your testimony on damages, if that is agreeable.

Mr. Hutchinson: Fine.

Mr. Ehrlich: Perfectly agreeable, your Honor.

Mr. Hutchinson: In that case, then, defendants may proceed with their evidence on liability.

Mr. Ehrlich: Before that, if you don't mind, I want to make a few motions.

If your Honor please, I want to renew—your Honor was kind enough this morning to permit me, in ruling on the motion, you ruled on the motion to dismiss without prejudice and I could renew them. I now want to renew the three motions I made this morning. I am not going to argue them at length. I think we covered them fully.

The first motion is to dismiss the complaint and the three counts on the ground that the contract which they have pleaded in their complaint is illegal and void and violative of the Constitution, the public policy and the Alcoholic Beverage Act.

I want to renew my second motion, which was as to Count One, that the contract speaks for itself; that there is no opportunity for them to vary the terms of a written contract; that the contract does not contain any requirement, illegal requirement on our part, and they don't allege any breach of contract. They allege a breach of an illegal contract which they plead, the condition they say that was an implied condition, to wit, that we solicited and turned over to retailers sales of Calvert products which we made.

So I say to your Honor that I am going to renew the [104] motion on Count One, which states no claim for relief.

As to Count Three, I renew the motion that it

states no claim for relief because the provision of Section 11 merely says "if the distributor desires". And it was interesting to note, your Honor, when Counsel read the Warner Brothers case, the case on its face used the words "optionor or optionee".

We have no option, we have no right, we have no privilege—merely a desire. I have a desire to win this case, but that doesn't mean I have a right, privilege or option to win this case. That is all this language here says, if the distributor desires to renew he shall notify Calvert and Calvert can act.

With reference to the motion to strike, I want to make a motion to strike the interrogatories, those portions of the interrogatories which your Honor admitted subject to motion to strike.

I want to make a motion to strike the testimony of this witness, Mr. Lewis, because we are not here defending what we did or did not do. Assume what he said to be true and we didn't perform any phase of the promotional work, that is not what we are charged with breaching in the first count. We are charged with breaching the solicitation and failing to deliver what we solicited, the sales, to the wholesaler.

Now, this can't be a condition. I don't want to argue this question because Counsel's brief shows it is a provision [105] of a contract. It could either be a condition precedent, concurrent or subsequent, this so called illegal requirement on our part. However, whether it is a condition or not, under the code section the condition might be illegal.

So I say to your Honor that there is no possibil-

ity that any parole evidence can vary these provisions of the contract, which are clear and in plain English, and accordingly I suggest that the case must be dismissed for the reasons which I have indicated, and at all events Counts One and Two.

The Court: The Court is prepared to rule.

Mr. Hutchinson: Very well, your Honor.

The Court: Submit your motion and then we will proceed.

Mr. Ehrlich: I have no further evidence.

Mr. Hutchinson: That will be the case except for our showing of damages. Since that is a new subject would the Court suggest we take the afternoon recess now while I get our data and evidence?

Mr. Ehrlich: Couldn't we do this? Wouldn't your Honor be prepared to rule on liability? If I am correct in my contentions, this question of damages will take a number of days to go into, and wouldn't it be wise to get the ruling of the Court on liability before we go into that?

The Court: Very well. You have submitted your case, have you?

Mr. Hutchinson: Yes, with the exception of the damages. [106] I assume Counsel has in mind perhaps submitting a memorandum?

Mr. Ehrlich: No, I am prepared to submit it without memorandum.

Mr. Hutchinson: Well, we have prepared a trial memorandum and our other memorandum on the motion to strike. I had in mind if the Court thought it would be helpful to give some argument in support of our evidence.

The Court: Do you want to submit the case now?

Mr. Ehrlich: Yes. One thing I did forget, your Honor, to make a motion to dismiss pursuant to Rule 41-B. I should just for technical purposes.

I made these preliminary motions, but at this time, the plaintiff having completed the presentation of his evidence the defendant without waiving our right to offer evidence moves for dismissal on the ground that upon the facts and the law the plaintiff has shown no right for relief.

With that motion made, I submit our case.

Mr. Hutchinson: We submit it with the exception of the reserved issue of damages, your Honor, and offer any argument, oral or written.

The Court: I would like to have these motions that you have indicated typed and tomorrow morning I will dispose of the case.

Mr. Ehrlich: Thank you.

The Court: Unless I change my mind on the case as now [107] submitted, I am about to grant the motion. I don't want anybody to be taken by surprise. But I want a proper record here.

Mr. Ehrlich: I will have my four motions written out.

The Court: Alright, tomorrow morning at ten o'clock.

(Thereupon this cause was adjourned to Thursday, January 17, 1957, at the hour of ten o'clock a.m.) [108]

Morning Session

Thursday, January 17, 1957, 10:00 o'clock a.m.

The Clerk: J. C. Millett versus Distillers Distributing Corporation, for further trial.

Mr. Ehrlich: I handed your Honor the motions which your Honor requested.

Mr. Hutchinson: If your Honor please, before the motion is made, Plaintiff would like to move the Court for its order under Rule 15(B) permitting an amendment to conform to proof.

If I may deliver the proposed amendment to the Clerk, and perhaps it would be, in order to permit a ruling, well if I would read it to your Honor.

The proposal is to amend paragraphs seven, eight, nine and ten of the first cause of action, which the Court will recall had to do with the complaint of promotional activities of the defendant, the opposition alleged to carry out those activities on behalf of the plaintiff, and the testimony that the promotional support was withdrawn in 1952 about mid-year.

The proposed amendment to paragraph seven is as follows:

[Note: "Amendment to Complaint to Conform to Proof" is set out at pages 30-33 of this printed record.]

We move the Court to permit the amendment in accordance with the rule, and to conform to the testimony of Mr. Lewis, the answers of the defendant and interrogatories already adverted to, and offered and set out particularly in plaintiff's trial brief, which I can identify briefly as portions of

defendant's answers to interrogatories fourteen, fifteen, and nineteen.

It is also to conform to paragraph six of the contract, which has been admitted into evidence as plaintiff's Exhibit 1, and therefore does conform to proof.

We believe it will also eliminate a portion of the argument on the motions which are anticipated on defendant's part.

The Court is of course familiar with the liberality contemplated by rule 15(B) in conforming to proof. Such amendments may be made even after judgment. We think the motion is timely and will be particularly helpful in eliminating some side issues of the argument this morning.

Mr. Ehrlich: If the Court please, I have practiced law for forty years and this is a new experience—I think it is [113] forty one years or forty two years, and this is a new experience to me. After we try a case——

The Court: Don't allow that to exercise you. We have this experience every week.

Mr. Ehrlich: Well, this is a new one on me. I have found you may conform in some minor degree, but here trying to state some certain theories, the complaint was filed in August of 1954. I think it was August, 1954. The complaint is a sworn document. They plead these causes. We go ahead and prepare it, we accept it, we take interrogatories, based on the three counts contained in the complaint. They fail to make proof. I make my argument on illegality. They find they are in a legal box.

Now they come to your Honor after the case has been submitted, after all my motions have been made, and they want to change their theory of the case. We are unprepared to meet this kind of issue. The statute of limitations—he says in seeking his amendment, he says this, that we breached this contract on July 1, 1952. This is January 18th or 19th, 1957.

The first thought that occurs to me, now he wants to amend to state a cause of action that has been barred by the statute of limitations.

But I just point that out to your Honor in passing. I say to you there isn't the slightest basis for permitting this to be filed. This is an amendment to change the entire cause [114] of action.

The purpose is obvious, your Honor. Your Honor indicated a point of view, elaborate arguments were made, we analyzed the facts and the law, and finding that he is out because of his pleading and because of his failure to prove, he comes in here after the case is concluded saying, "I want to file a new cause of action."

I submit that the rule was never conceived to cover a situation of this kind.

Mr. Hutchinson: Insofar as the argument is concerned, your Honor, in the first place plaintiff from the very start claimed there had been a breach of the specific written contract and a failure to carry out promotional activities.

The Court: You didn't prove it.

Mr. Hutchinson: Promotional activities. The only one that Mr. Ehrlich is complaining about is

that our proof did not show that this man solicited orders unlawfully.

Now, as to the statute of limitations, paragraph C of Rule 15 provides:

“Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction or occurrence set forth or attempted to be set forth in the original pleading the amendment dates back to the date of the original pleading,”

so we are not faced with any statute of limitations. [115]

The answer need not be amended because the denials run to the paragraphs and their special defenses are set up.

There is no necessity on their part to amend. This does conform to the proof. The contract does provide for promotion, the promotion described by the witness. It was carried out prior to the time when this meeting was had with Mr. Garfield and Mr. Taube, and thereafter it was dropped. Thereafter he never entered the place or gave support of any kind. That would be a failure of good faith to carry out the undertaking to promote.

We submit that the motion is valid in all respects and that it will advance justice.

The Court: Have you a copy?

Mr. Hutchinson: I have it here.

Mr. Ehrlich: I want to make a further point that your Honor suggested there has been no proof been admitted, and it has all been admitted subject

to my motion to strike. There is no proof of any kind.

I also call to your Honor's attention the fact that there is no proof we ceased promotional activities. All that Mr. Lewis, who was on the stand, testified to was that he didn't go into the Millett store. We have had no opportunity to make any showing of any kind, and he has made no showing which is necessary to rebut.

Mr. Hutchinson: The witness placed Mr. Fischer, the [116] other specialty man in the East Bay, in the conversation. He placed Mr. Garfield. He testified Mr. Fischer is still employed by the defendant at this time. Presumably Mr. Garfield is still alive and employed as originally.

Mr. Ehrlich: That isn't true. Why make a statement you don't know?

Mr. Hutchinson: I say presumably.

Mr. Ehrlich: Well, it isn't true.

Mr. Hutchinson: Being shown to exist, it is presumed it continues. If you want to show a change, you can do so.

The Court: I warn you gentlemen, I am liable to get nervous if you are not careful.

Mr. Hutchinson: Sorry, your Honor.

The Court: Now, I have in mind a form of judgment in this case if you want to dispose of this case on the motion.

Mr. Ehrlich: Yes, your Honor. We are prepared to stand, if your Honor please, on these various motions, and particularly the last motion which I have here, your Honor, in which we make

a motion, as we did yesterday, to dismiss the complaint and each cause of action thereof under the provisions of Rule 41(B), Federal Rules of Civil Procedure on the ground that under the facts and the law the plaintiff has shown no right to relief. We are prepared to stand on that.

The Court: The motions to amend these pleadings will [117] be denied.

Mr. Hutchinson: On the other motion, could we be heard briefly on that, your Honor? I understand Counsel is going to argue that now?

Mr. Ehrlich: No, I am not going to argue it. We submitted it yesterday.

Mr. Hutchinson: I would like to be heard briefly, your Honor, if I may.

The Court: All right, you may proceed. [118]

* * * * *

Mr. Hutchinson: Now, the right to renew is expressed in leases and contracts with which the Court is unquestionably familiar in many, many numbers in the business life in California.

The Court: If the theory in your case in that respect was true it would be a never ending contract.

Mr. Hutchinson: I would like particularly to call the Court's attention to the cases which hold what I have advised the Court I believe they did hold on that subject.

The Court: Give me you leading case and let's analyze it.

Mr. Hutchinson: Very well, your Honor. The principal case is Penilla versus Girsten, 86 Cal.

App. 668, 261 Pacific 488, which is quoted in a more recent case involving a distributorship contract and asserted breach thereof, your Honor, in 105 Cal. App. 2nd 103, here in the Supreme Court denied, and I am quoting the quotation in the latter case from the Penilla case.

The Court: It is well to recite what the facts are in those cases before we will be able to dispose of it.

Mr. Hutchinson: Yes. To take the most recent one, Ichen versus Pepsi Cola Bottling Company, 105 Cal. App. 2nd 113, this involved a number of distributors of a soft drink [124] Pepsi Cola, a brand name for a soft drink. These people had been dealing for a number of years. They originally had a contract which had a provision for renewal. It was exercised and the contract continued for another year. Subsequently other agreements were made without repeating the renewal provision.

The court held specifically that the original option to renew having been exercised, was finished and was not carried on into the future dealings three or four or five years later.

The Penilla case, which was quoted and relied upon in the Pepsi Cola case, involved a lease. This was a lease which provided for a renewal, and this is the statement of the rule:

“A general covenant to extend or renew implies an additional term with respect to the first, and upon the same terms except a covenant to renew to include which would make the least perpetual.”

The emphasis on “except a covenant to renew”

was supplied by the court in the Pepsi Cola case from which this is quoted.

The Supreme Court of the State of California very recently had occasion to consider another type of option in a lease, your Honor, in Spaulding versus Yoving-Young, 30 Cal. 2nd Reports, 138 to 142. There was not an option to renew but an option to purchase. It was in a lease on real property.

The lease also provided for an extension of the lease. [125] By simply holding over there was to be an extension of the lease, quote "upon the same terms and conditions." Several months after the extended period had commenced but after the term of the specific lease had ended, the lessee or assignee, I forget which, but at any rate the person claiming the right, entitled to the right of the lessee, attempted to exercise that option, and the court specifically held that it could only be exercised during the term of the original agreement and not during any extended period.

The Court: What was the term?

Mr. Hutchinson: As I recall, it was a two year term. [126] * * * * *

The Court: I will ask counsel on either side if they consulted the local rules, Rule 21, in relation to judgment and findings?

Mr. Hutchinson: I have consulted that but not with this immediate argument in mind, your Honor.

Mr. Ehrlich: I haven't read it, your Honor, but the thought occurred to me we did in the pretrial submit certain evidence.

The Court: I have in mind this record and a judgment on this record. With the energy your opponent has here, I am sure he is going across the hall, and I don't want to engage in an idle act here. That is all I am thinking about.

I think a proper record should be made here and I am not altogether satisfied with this record, disposing of it on the [134] motion itself. However, if that is your position, I will have to act.

Mr. Ehrlich: The thought occurred to me I would like to consider whether I should ask for a judgment in view of the fact that we did submit some evidence on our side in connection with the pretrial.

The Court: I denied the motion myself.

Mr. Ehrlich: Yes. Probably it would be preferable here for us to have a judgment and finding.

Mr. Hutchinson: If I read the rules of the Supreme Court correctly—I can't say for the moment which rule it is——

The Court: Our local rules is what I had in mind.

Mr. Hutchinson: I was going to say it might not make much difference if that rule is helpful at all to the Court. I believe it would require findings, even then, even in this situation; if the motion were granted it would require findings.

The Court: That is what I had in mind. I want to get up a proper record here and give both sides an equal opportunity.

Mr. Ehrlich: What I am concerned about now is the fact that we did introduce on our part these admissions from the interrogatories, and it might

be considered that we did put in evidence. Accordingly, I think we ought to comply with Rule 21 and have a judgment on the merits. [135]

The Court: If you are not satisfied with that, I will open up this case and give either side an opportunity.

Mr. Ehrlich: I am satisfied with our record. I have no further proof.

Mr. Hutchinson: If counsel wishes, we would stipulate he could withdraw his offer on pretrial of the evidence, if you want to submit it on the motion.

Mr. Ehrlich: No, I don't want to at this time.

The Court: I never went so far as to tell anybody what they should do. I do the best I can with the material presented.

Mr. Hutchinson: I am sure we all like to have the Court's comments on the case set out in as clear a way as possible.

Mr. Ehrlich: I think I would submit it on the merits, your Honor, in preference to the motions. Because I did introduce some testimony, I prefer to submit it on the merits.

Mr. Hutchinson: May we have a stipulation, your Honor, notwithstanding that the question of damages has been deferred, may I request whether counsel is willing to stipulate the question of actual injury and the amount and fact of damages is not an issue that has been submitted and that nothing is suffered by the plaintiff by reason of not having that?

The Court: Are you prepared to go on with damages this morning?

Mr. Hutchinson: Yes, your Honor. [136]

The Court: Is the defendant prepared to go on? If you want further time, I will give it to you. Call your witness.

Mr. Ehrlich: Wouldn't it be preferable, your Honor, to reserve the rights on damages than to go through this? This will go for some time because we intend to have expert witnesses and go into the books and records, and it seems to me an idle act at this time if we could make a proper stipulation so that in the event counsel decides to——

The Court: (Interposing.) I think that would be the best thing to do.

Mr. Hutchinson: I suggested that, your Honor, in view of what had gone forward this morning and yesterday. In other words, we don't want to be in a situation here where it will be said, "You didn't offer any proof that you are damaged." We don't want to be in that position.

Mr. Ehrlich: Couldn't we work out a stipulation? I want to be careful. This isn't a stipulation. I am just suggesting it.

The Court: I will take a recess so that you may get together.

(Short recess.)

Mr. Ehrlich: If your Honor please, we have arrived at a stipulation which reads as follows: That plaintiff is ready and willing to offer proof of loss and damage relating [137] to the First Cause, Second Cause and Third Cause of Action, but defers such offer of proof without prejudice to

either party, by stipulation of counsel in open court, pending the Court's determination of liability.

Mr. Hutchinson: That is acceptable to us, your Honor.

The Court: Very well.

Now, I will offer another suggestion so that both sides will at least have a full opportunity. If either side wants to present any testimony in relation to what the record already discloses, they may do so. If not, why, submit your case.

Mr. Ehrlich: Submitted, your Honor.

The Court: Prepare the judgment in accordance with the rules I just called your attention to—judgment and findings.

Mr. Ehrlich: For the defendant, your Honor.

The Court: Yes. And when will you be here? Shall we let it go over five days?

Mr. Ehrlich: We will have it done in the next couple of days.

The Court: Serve a copy on opposing counsel.

Mr. Ehrlich: Yes, your Honor.

The Court: It may go over on the calendar, to give you an opportunity, until the 24th. Is that agreeable?

(Discussion between court and counsel off the record.)

The Court: Is the 25th agreeable? All right, January 25th.

(Thereupon this cause was adjourned to Friday, January 25, 1957, at the hour of 10:00 o'clock A.M.) [138]

Friday, January 25, 1957, 10:00 o'clock a.m.

The Clerk: Millett vs. Distillers Distributing Company, settlement of findings, entry of judgment.

Mr. Ehrlich: We have presented findings, if your Honor please.

The Court: Is that on the calendar this morning?

Mr. Ehrlich: Yes, your Honor. We have presented our findings. I have been served with objections. My only statement is that the matter has been thoroughly argued to your Honor on a number of occasions and I am prepared to submit them, and I am satisfied that our findings correctly express the conclusions of the Court.

Mr. Hutchinson: If the Court please, we have filed objections so that on submission the Court will have our objections spelled out rather fully. We have, as counsel has indicated, argued this matter to the Court in connection with motions, and I do not think it would be appropriate to repeat our arguments here and now. We do, however, ask the Court to recall our arguments and the authorities we cited, in reviewing these findings, and that each of our objections be considered in the light of the authorities and the argument we have already submitted to the Court, particularly including our trial brief and the memorandum on the motion to dismiss, as well as the oral argument in open court during the trial. [139]

There are two points which I would like, however, to briefly comment upon, your Honor, and particularly urge that if the Court determines that these proposed findings and conclusions of the judgment

are otherwise acceptable and they conform to the Court's views of the matter, these two, at least, should be reviewed. The first is paragraph 12 of the proposed findings appearing on page 3, lines 23—

The Court: Paragraph 12 what?

Mr. Hutchinson: Twelve of the proposed findings, appearing on page 3, line 23 through 26. So we will have that language before us I will read it. That reads as follows:

“That it is not true that plaintiff has been damaged in the sums alleged in plaintiff's Complaint, or in any other sum by reason of any acts or conduct on the part of the Calverts Distillers Corporation or its agents, servants or employees.”

The Court will recall that by stipulation damages were reserved.

The Court: Yes.

Mr. Hutchinson: So that it would be improper to find there were no damages. Moreover, it was the sense of the Court's ruling, as we understood it, that it was not that the plaintiff was not damaged; as a matter of fact, there is a presumption that the plaintiff was damaged by losing the order submitted, by losing the claim, and by losing the year's [140] opportunity to sell Calvert and Carstairs products. In other words, it was the Court's view, as we got it, that there was no liability.

The Court: You reserved in the stipulation the amount of damages, but I concluded he was not entitled to any damages.

Mr. Hutchinson: The Court ruled on the ques-

tion of liability, and it would be improper for the Court to find that there were no damages. I think the Court should strike that.

The Court: How would you make a finding?

Mr. Hutchinson: I think there should be no finding on damages at all. If the Court finds there is no liability, it is impossible to consider damages.

The Court: Well, I am going to sign that.

Mr. Hutchinson: Finding that there is no damage?

The Court: Yes, that is what I found.

Mr. Hutchinson: I thought you found there was no liability, your Honor.

The Court: We are juggling words.

Mr. Hutchinson: We consider that a matter of importance in the case, your Honor.

The Court: However, I will think it over.

Mr. Hutchinson: The other one is in the purported conclusions, No. 4, appearing on page 4 of the proposed findings and conclusions, lines 13 through 15. It is very [141] brief. I will read it.

“The contract pleaded in plaintiff’s Complaint and relied upon by plaintiff in this action was and is illegal, null and void.”

First in that connection, we would like at this time to renew, without going into detail, our motion for leave to amend to conform to the proof.

The Court: We have a record on that.

Mr. Hutchinson: Yes.

The Court: I denied your motion.

Mr. Hutchinson: I am merely remarking it, your Honor, as the Court itself suggested, to see that our

record is as complete as we can make it. On that point it is our submission that the paragraph in the conclusions should be stricken, because there is no issue and no proof, and in that connection may I call the Court's attention to *Patapar Corporation vs. Paramount Pictures Corporation*, 347 U.S. 89, 98 Law Edition (I do not have the pages). I am looking at an advance sheet citation. In the advance sheet it is page 301. That case arose in California in the District Court and reached the Supreme Court. The factual background, insofar as our point is concerned, was rather briefly this, your Honor: Paramount had joined a conspiracy or combine to enforce restrictions on theatres and use of films and theatres, a matter which has engaged the Federal Courts at some length. The United States [142] sought an injunction in a civil action under the Sherman Act, Sections 1 and 2, I believe, on the ground, among others, that the contract, namely, a franchise for the selling of pictures and a lease, were in restraint of trade; secondly, there was an underlying conspiracy whence these documents arose, and for which purpose they were made and carried out. The trial court in that case found on both grounds, namely, that the contracts were invalid; secondly, that they were a part of a conspiracy and used as a means of carrying it out. The United States in that case, the Government case, was affirmed on the conspiracy but reversed as to the finding that these franchises and the leases were invalid on their face per se, as the defendant here apparently argues. The civil action com-

menced when Paramount sought to take advantage of its own wrong, as does the defendant here, and brought an action in unlawful detainer, or at least for the purpose of securing possession of the premises on the theory that the lease was invalid as in restraint of trade. The trial court properly held where there was no evidence of conspiracy, the contracts were not invalid on their face and denied all relief to the lessee, who was seeking by counter-claim treble damages under the United States anti-trust laws. The court very pointedly makes it clear that since the contract is not invalid on its face, and there was no evidence of conspiracy in the immediate case, even though there was proof to a degree in the Government [143] case, there could be no finding of invalidity or illegality, and that the dismissal without trial of the counter-claims and the ignoring of the issue as stated by the answer was proper. That the United States Supreme Court affirmed, notwithstanding that the counter-claims had been severed, and set for trial. They said that the trial and answer were sufficient. We particularly urge that those two provisions be stricken, your Honor, if the Court otherwise overrules our other objections.

The Court: Does the matter stand submitted?

Mr. Ehrlich: Yes, your Honor.

Mr. Hutchinson: Yes, your Honor.

The Court: Very well. The matter stands submitted.

[Endorsed]: Filed March 5, 1957. [144]

[Endorsed]: No. 15480. United States Court of Appeals for the Ninth Circuit. J. C. Millett Co., a corporation doing business as Key Distributing Co., Appellant, vs. Distillers Distributing Corporation, Appellee. Transcript of Record. Appeal from the United States District Court for the Northern District of California, Southern Division.

Filed: March 11, 1957.

Docketed: March 19, 1957.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the Ninth Circuit.

In The United States Court of Appeals
For The Ninth Circuit

No. 15480

J. C. MILLETT COMPANY, a corporation, doing
business as KEY DISTRIBUTING COM-
PANY, Appellant,

vs.

DISTILLERS DISTRIBUTING CORPORA-
TION, et al., Appellee.

APPELLEE'S DESIGNATION OF ADDI-
TIONAL PARTS OF THE RECORD
DEEMED MATERIAL

Pursuant to Rule 17(6) of this Court, appellee hereby designates the following parts of the record

deemed material, all of which are in addition to those heretofore designated by appellant:

1. Findings of fact and conclusions of law;
2. Interrogatories propounded by appellant to appellee numbered 21(a), (b);
3. Answer of appellee to appellant's interrogatory numbered 21(a), (b) as quoted in the reporter's transcript on appeal, page 62, line 23, through page 63, line 14;
4. Interrogatory propounded by appellee to appellant numbered 4;
5. Answer of appellant to appellee's interrogatory numbered 4 as quoted in reporter's transcript on appeal, page 57, lines 8 through 26;
6. Reporter's transcript of oral proceedings as follows:
 - (a) Page 11, line 10, through page 23, line 15;
 - (b) Page 24, line 14, through page 33, line 22.

Dated: March 27, 1957.

PHILIP S. EHRLICH,
IRVING ROVENS,
Attorneys for Appellee.

Certificate of Service Attached.

[Endorsed]: Filed March 28, 1957. Paul P. O'Brien, Clerk.

No. 15,480

IN THE

United States Court of Appeals
For the Ninth Circuit

J. C. MILLETT Co., a corporation doing
business as Key Distributing Co.,
Appellant,

vs.

DISTILLERS DISTRIBUTING CORPORATION,
Appellee.

Appeal from the United States District Court for the
Northern District of California,
Southern Division.

APPELLANT'S OPENING BRIEF.

J. ALBERT HUTCHINSON,
LEON A. BLUM,
55 New Montgomery Street,
San Francisco 5, California,
Attorneys for Appellant.

FILED

JUN 20 1957

PAUL P. O'BRIEN, CLERK

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No. 15,480

IN THE

**United States Court of Appeals
For the Ninth Circuit**

J. C. MILLETT Co., a corporation doing
business as Key Distributing Co.,

Appellant,

vs.

DISTILLERS DISTRIBUTING CORPORATION,

Appellee.

Appeal from the United States District Court for the
Northern District of California,
Southern Division.

APPELLANT'S OPENING BRIEF.

PART ONE.

PRELIMINARY STATEMENT AND REFERENCES.

This is an appeal from a judgment, in a removed cause, in an action seeking damages upon breaches and repudiation of a written contract for the sale and purchase, for resale and distribution, of alcoholic beverages within the Counties of Alameda and Contra Costa, State of California.

References herein are as follows: plaintiff-appellant, *plaintiff*; defendant-appellee, *defendant*; State of Cal-

ifornia, *the state*; general references herein to statutes are to those of the state; Alcoholic Beverage Control Act, Sections 23,000 through 25,762 of the Business and Professions Code of the state, *the act*, and words and expressions therein defined are, unless otherwise indicated, used herein in the sense contemplated therein; Rules of Civil Procedures, *the rules*; transcript of Record, "T", with page given, and to pleadings and filings below by designations thereof in the trial Court.

Unless otherwise indicated, insertions, omissions and emphasis in quotations herein are supplied by counsel.

PART TWO.

STATEMENTS AS TO JURISDICTION AND OF THE CASE.

I.

STATEMENT AS TO JURISDICTION.

Jurisdiction of the District Court was invoked under Title 28, United States Code, Sections 1441 and 1332, reading in part:

Section 1441:

“(a) * * * any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending”;

Section 1332:

“(a) The district courts shall have original jurisdiction of all civil actions where the matter

in controversy exceeds the sum or value of \$3,000 exclusive of interest and costs, and is between:
(1) Citizens of different States;”

upon the allegations of the verified complaint, (T 3-13) and by petition for removal and stipulation substituting defendant (T13), from which it appears that plaintiff is a corporation duly organized and existing under the laws of the State of California and defendant is a corporation duly organized and existing under and by virtue of the laws of the State of Delaware,¹ and allegations of plaintiff’s damages sustained by the breaches of contract set forth in the complaint in the three respective causes of action in the amounts of \$25,000, \$25,000 and \$100,000 (T8, 9 and 12).

The jurisdiction of this Court has been invoked under Title 28, United States Code, Section 1291, reading in part:

“The Courts of Appeal shall have jurisdiction of appeals from all final decisions of the District Courts of the United States * * *”,

by the timely taking of the instant appeal from the judgment of the District Court (T43-44) upon findings of fact (T38), and judgment providing, in part:

“Now, therefore, * * * It Is Ordered and Adjudged that plaintiff take nothing by its action

¹Responsive to the pleadings, stipulations and orders, the District Court in its findings (T39) found as follows:

“That it is true that this action involves a controversy which is wholly between citizens of different states and that the matter in controversy exceeds the sum of \$3,000.00, exclusive of interests and costs.”

and that defendant have judgment for its costs and disbursements herein expended * * *”

II.

BRIEF STATEMENT OF THE CASE.

This action was instituted in the state Court by plaintiff, a wholesaler of alcoholic beverages and other products in the state, against defendant, an importer and manufacturer's agent, merchandising alcoholic beverages in interstate and foreign commerce, for damages upon breaches of contract.

The verified complaint, in conformity to state practice, sets forth the facts of the case in detail alleging the three independent causes of action, each relating to one of the independent breaches of contract.

The contract in suit is in writing, was made and entered into between plaintiff and defendant's predecessor interest, Calvert Distillers Corporation (herein called Calvert), as of the 14th day of March, 1952, and expressly provides:

“This agreement shall be interpreted under the laws of the State of California.” (Plaintiff's Exhibit 1, par. 15, appended hereto as Appendix I.)

The stated and principal purposes of the contract was to provide for the appointment of plaintiff as a Calvert distributor² in the Counties of Alameda and

²This relationship, as contemplated, by the parties at this time and place, is as follows:

“The distributorship contract in the case at bar is more than a contract of employment or agency. It is also a contract of sale.

Contra Costa in the state, for the purchase by plaintiff for resale, from Calvert of the products of Calvert Distillers Co. and Carstairs Distilling Co., Inc., within said areas and to control the method of conducting these operations. The original contract term was the period, March 14 to December 31, 1952, and provided for renewal at the option of plaintiff and, alternatively, for the return of plaintiff's unsold inventories of such merchandise remaining on hand—in the event the plaintiff did not exercise its option.

One of the provisions of the contract (par. 6) required Calvert to promote the sale of its products in support of plaintiff's efforts in the distribution and resale of such products, and the first cause of action of the complaint sets forth the breach of this undertaking (T4-8).

Another provision of the contract (par. 5) bound Calvert to supply its products to plaintiff, and the second cause of action in the instant complaint alleges a breach of this undertaking by Calvert (T9), in that an order was placed during the operative period of the contract for 900 cases of products described in the contract which were not delivered in accordance with the contract or otherwise.

The third cause of action alleges a breach, or repudiation, of the renewal provision of the contract (par. 11 and 12) by Calvert, in refusing to recognize

On the other hand, it is more than a mere sales contract. It partakes of substantial aspects of both."

J. C. Millett Co. v. Park & Tilford Distillers Corp., 123 F.S. 484, 492.

and carry out the contract during the renewed period created by plaintiff's exercise of its option to renew the existing contract (T9-13).

Defendant's answer contains admissions of many of the facts material to the respective breaches set forth in the complaint.

There was only a brief trial of the factual issues and, by stipulation, the parties submitted the case on the issues as to liability, with the issues as to damages reserved, the stipulation (T151-152) reading as follows:

“That plaintiff is ready and willing to offer proof of loss and damage relating to the First Cause, Second Cause and Third Cause of Action, but defers such offer of proof without prejudice to either party, by stipulation of counsel in open court, pending the Court's determination of liability.”

With the exception of the damage issues, plaintiff offered proof in support of each of the material allegations of its complaint not admitted by defendant's answer. Defendant offered no testimony and the only evidence submitted in its behalf consisted of stipulations as to certain formal matters and the introduction of certain interrogatories and answers to interrogatories propounded by defendant to plaintiff (T93-100). Notwithstanding the express reservation of the damage issues pending determination of the liability issues and questions, the Court ultimately made findings (T41, finding XII) that plaintiff had not been damaged in the premises.

Originally it was proposed that the action be determined upon a motion to dismiss made by defendant at the conclusion of plaintiff's case in chief (T137-139; 141-146; 33-34). Subsequently the Court determined that the action should not be resolved upon the motion and directed that findings and a formal judgment be submitted (T148-152; 153-155).

In brief, defendant's motion to dismiss was based upon the assertion of an obscure theory of unlawful purpose of the contract (T33-34; T52-78; T137-139).

Prior to the submission of the motion and the submission of findings, plaintiff moved for leave to file an amendment to its complaint to conform the allegations of Paragraphs VII through X of the first cause of action to the proof (T30-33) but plaintiff's motion was denied by the trial Court (T146; 141-144; 155-156).

A. SUMMARY OF THE ISSUES, ADMISSIONS, EVIDENCE AND FINDINGS, AS RELATED TO THE RESPECTIVE CAUSES OF ACTION SET FORTH IN PLAINTIFF'S COMPLAINT.

1. The First Cause of Action.

There is no issue raised as to the formal matters set forth in the first six paragraphs of the first cause of action of plaintiff's complaint (T3-6) relating to the incorporation, license status and license privileges of the respective parties, methods of doing business as between the parties and with third persons, etc., etc.

The seventh and ninth paragraphs of the first cause of action of plaintiff's complaint tender the issues as to the breach of paragraph 6 of the contract, reading as follows:

“6. *Calvert agrees to promote³ the sales of its products and to advertise its products in a manner consistent with the type of merchandise in cases sold * * **”.

The counterpart to the undertaking contained in the paragraph 6, last quoted, is set forth in paragraph 7 of the contract imposing upon plaintiff the following duties with respect to promotion of Calvert's products as follows:

“Distributor agrees it will maintain an adequate sales force properly to represent and to *promote the sale of Calvert products in its designated territory*. Distributor agrees to keep this sales force properly informed as to all Calvert policies and to train them to sell merchandise in a manner which shall be a credit to distributor and to Calvert. * * *”.

³The usage and custom of solicitation of sales, as a part of manufacturers' "promotion" in this field of merchandising in the area at the times herein involved are stated in the case of

J. C. Millett Co. v. Park & Tilford Distilleries Co., 123 F.S. 484, 488,

as follows:

“As is normal in the industry, this sales representative called upon retailers to solicit orders for Park & Tilford distributors. He did not take signed orders.”

It is substantive state law that contracting parties have contracted in reference to such usage and custom, which form a part of the contract (*Guipre v. Kurt Hitke & Co.*, 109 Cal. App. (2d) 7, 14, 240 P. (2d) 312; *Covelly v. C.A.B. Construction Co.*, 110 Cal. (2d) 30, 33, 240 P. (2d) 87 (hearing, Supreme Court, denied).

Paragraphs VII and IX of the complaint (T6, 7; 7-8) allege as follows:

“At all times herein mentioned the defendants have employed salesmen, sometimes known as ‘specialty men’, and *directed and required said salesmen to call upon the customers of its said distributors in purported support of the sale of defendants’ products by such distributors to such customers*; that said salesmen have at such times solicited orders and sales as defined in said Act, for defendants’ products of and to persons other than those licensed in this state as wholesalers, manufacturers and rectifiers, *and have submitted the orders so solicited and obtained to defendant’s said distributors in such area for delivery thereof.*”

* * *

“One of the conditions of said agreement was that *defendants agreed to promote the sale of its products by continuing to employ salesmen* sometimes known as ‘specialty men’ within the counties of Alameda and Contra Costa *in the manner and for purpose as specified in the preceding paragraph 7 hereof, and submit the orders so solicited and obtained within the said two counties to Key Distributing Co. for delivery.* On and after March 14, 1952, when the said written agreement was executed between the parties hereto, the *defendants did continue to employ such salesmen and said salesmen continued to solicit and obtain orders in purported support of the sales of defendants products, but failed, neglected and refused to submit all of its orders to Key Distributing Co. for delivery but submitted a substantial portion thereof to other competing wholesale dis-*

tributors of defendant in the said two counties for delivery.”

Defendant’s answer to the allegations last quoted sets forth a general denial of the allegations, except admissions as to its method of distributing its products through wholesale licensees, its limiting and restricting the sale of its products to such distributors, and the following:

“* * * at all times mentioned in plaintiff’s complaint it has employed salesmen, sometimes known as ‘specialty men’; (T15).

By its answers to interrogatories propounded by plaintiff, the further admissions appear, namely (T105):

“*‘Specialty men’ employed by defendant* during the period January 1, 1952, to date were and are instructed that if *in the course of their promotional work* a retailer indicates that he desires to purchase defendant’s products, that *information is to be passed along to the wholesaler of the retailer’s choice.*”

“*If in the course of their promotional work defendant’s ‘specialty men’ discovered that a retailer desired to purchase defendant’s products, they would ask the retailer for the name of the distributor with whom the retailer desired to do business. After the retailer had designated a distributor, the distributor selected would be notified.*”

Plaintiff’s witness, Franklin Lewis, (T110-136) described his functions, as one of defendant’s specialty men, in part as follows (T117):

“*My work consisted of promoting the sale of Calvert merchandise by placing point of sale material; showing our newspaper, magazine, billboard and card programs; to tell the Calvert story.*

“We had a story to tell at the time about the merits of our merchandise over and above the competition’s merchandise. *To work with the wholesale people.* To, as we called it, ‘high spot’ with them when they felt that they would like to sell our merchandise against competitive labels, particularly at the bar level. I am talking now in terms of plus business . . .

* * *

“‘High Spot’ merely means, your Honor, that at the request of the wholesale salesman, if he has a specific call—for example, for me to make a specific appointment with him, make a call and tell my story as against whatever we are trying to sell against. *The wholesale man consummates the sale if he is able to. I contribute what I think I can.*

* * *

“*As I say, my job was to promote the sale of Calvert merchandise, help the wholesale people in any possible way that I could.*

* * *

“Well, during most of the time that we had the dual arrangement with Key and Julliard, I worked up at the Julliard House, but also worked with the two people periodically when my geographic area was the area in which they worked” (T118).

* * *

“Now, in calling on retailers, *did you, as part of your work for Calvert, call on retailers who were*

purchasing or not purchasing Calvert's products to see if anything could be done *to promote that production, independently of any particular wholesaler's previous appointment?* Do you understand what I mean?

* * *

"Yes."

"In that connection, did you call for the purpose of presenting such point-of-sale material?"

"That and specific approach to whatever our particular promotion was at that time of the year, and try to increase the sale of our goods." (T119-120.)

* * *

"*Now, in your independent calls on retailers what happened, if it did happen, when the retailer needed some further Calvert products to complete his stock or, if he didn't have any, to install the item in his place? What would you do if you found that situation?*"

* * *

"Allowing that there was any appreciable quantity, *contract the wholesaler specified by the retailer, and he would consummate the sale if possible either with the help of the specialty man or by himself.*"

"Now, you did that, did you, or did you not?"

"Yes, indeed I did."

"Were you in general instructed to carry out the activities you have described by your superiors?"

"Yes." (T124-125.)

Concerning the breach by Calvert of the undertaking to promote its products, in support of plain-

tiff's resale activities, this witness further testified, in part (T124-125):

"Now, with relation to the summer of 1952, June or July, *was there any change made in your activities on behalf of Calvert in those things that you have been describing?"*

"*Yes, there was.*"

"Did that all come about by reason of something said to you by Calvert personnel?"

"Yes." . . .

* * *

"*What, if anything, was said with regard to promotions by you in your work in the Key Distributing Branch of the plaintiff?"* (T127.)

* * *

"*I was told specifically—there was another man involved in this, too. We were both told to withdraw all support to Key Distributing Company and not even to put—this isn't a direct quote, but it is as close as I can remember—not even to put our foot in the door.*" * * *

"*After you were so directed by Mr. Garfield, and either Mr. Taube or Mr. Garfield in Mr. Taube's presence, did you then give any assistance to Key Distributing branch of the plaintiff?"*

"*None whatever.*"

"In the event a retailer appeared in need or expressed a desire to purchase Calvert products, *what if anything were you instructed to say to him in that connection?"*

"Well merely, — I mean, *it's a trick of the trade. It's a way to emphasize one and de-emphasize the other, and over the years you know how to do that.*"

“And you were so instructed?”

“That is correct.” * * *

“And you gave no help whatever?”

“None whatever.” (129-131.)

It is substantive state law that in every contract there is an implied covenant and undertaking⁴ that neither party will do any act which will deprive the other contracting party of the benefits of the contract.

In addition to the admissions and denials contained in its answer to the first cause of action of plaintiff's complaint, defendants (T17) asserted a purported special defense of “illegality” as follows:

“... defendant alleges that if, as alleged in paragraph IX * * * one of the conditions of the written agreement between the parties * * * was that this defendant agreed to promote the sale of its products by continuing to employ salesmen * * * for the purpose specified in paragraph VII * * * said condition was and still is illegal, null and void, because it is and was at all times mentioned * * * unlawful for the defendant * * * to solicit⁵

⁴A recent restatement of this principle appears in the case of *Universal Sales Corp. v. Cal. etc. Mfg. Co.*, 20 Cal. (2d) 751, 771, 128 P. (2d) 665; in part:

“A further matter to be considered in connection with the trial courts' findings, as above recited, is the relationship existing between the parties pursuant to their agreement regarding their cooperative undertaking. *In every contract there is an implied covenant that neither party shall do anything which will have effect of destroying or injuring the right of the other party to receive the fruits of the contract*, which means that in every contract there exists an implied covenant of good faith and fair dealing. * * *

⁵Section 23773 of the act (relating to the privileges of Calvert's and defendant's license) expressly provides:

“*Agents soliciting orders. The provisions of Sections 23771 and 23772 do not prevent agents or employees of a distilled*

or obtain orders for alcoholic beverages from persons licensed * * * to sell alcoholic beverages at retail and/or from unlicensed persons * * *”

The findings of the trial Court responsive to the first cause of action in plaintiff’s complaint are the following (T39-40) (Paragraphs IV and V):

“That the allegations contained in paragraph IX of the first cause of action of plaintiff’s complaint are, and each of them is, untrue.

“That the allegations contained in paragraph II of defendant’s second, separate and distinct defense to plaintiff’s first cause of action are, and each of them is, true.”

The only conclusions of law responsive to this subject matter are found in Conclusions I and IV (T41-42) and read in material part as follows:

“The contract made and entered into by Calvert Distillers Corporation and plaintiff . . . was not breached by Calvert Distillers Corporation in any respect.

* * *

“The contract pleaded in plaintiff’s complaint and relied upon by plaintiff in this action was and is illegal, null and void.”

2. Second Cause of Action.

Plaintiff’s second cause of action realleges, by reference, all of the allegations contained in the first cause of action except paragraphs IX and X (T9) and further alleges as follows:

spirits manufacturer located without this State from soliciting orders for distilled spirits within the State.”

“On December 15, 1952, while the said agreement dated March 14th, 1952 was still in full force and effect, and pursuant to and in accordance with the terms thereof, the Key Distributing Co. executed and delivered to the defendants a written purchase order requesting shipment of nine hundred (900) cases of various sizes of the products of the defendants. Copy of said purchase order is attached hereto marked ‘Exhibit 2’ and incorporated herein by this reference.”

The third paragraph alleges that the order was not carried out and the fact and amount of plaintiff’s damage by reason of the non-delivery of the merchandise ordered (T9).

In answer to the second cause of action (T18-22) defendant (T18) expressly admitted the allegations contained in paragraph II as above quoted and further admitted “that defendant did not ship and deliver to the Key Distributing Co. the said 900 cases of products or any portion thereof”.

By way of special defenses, defendant quoted paragraphs 5 and 12 of the contract (appendix) and averred (T19):

“That defendant did not ship and deliver to Key Distributing Co. the merchandise listed in the written purchase order executed and delivered to defendant by Key Distributing Company in December 15, because said order would have resulted in an inventory of defendant’s products . . . greater than a 45-day inventory . . .

and

that the merchandise listed . . . if shipped by defendant, would have arrived . . . on or about the

date the said agreement between the parties terminated; that it would have been an idle act for defendant to ship and deliver to Key Distributing Co. the merchandise specified in said written purchase order because, under the terms of paragraphs 12 of the said agreement between the parties, Key Distributing Co. would have been obligated to return⁶ said merchandise to the defendant at its invoice price.”

The only evidence offered by defendant throughout the trial of the action, related to the subject matter of the “special defenses” just noted, consisted of the answers to interrogatories by defendant to plaintiff (T94-95; T100).

There was no showing that the order was not in fact filled for any reason related to plaintiff’s inventory or prospective inventory, or that such refusal was stated to have been made upon any such ground. There is no showing as to the date of arrival of the ordered merchandise or of the inventory on the date when it would have been delivered, defendant expressly refusing to disclose this fact (T92).

The data submitted by defendant by means of the interrogatories (T94-95) was that plaintiff had 1410 assorted cases of defendant’s merchandise on hand on December 15, 1952, when the order was placed; and, with the addition of the 900 cases plaintiff would have had a total of 2310 cases; whereas, the average 45

⁶Paragraph 12 of the contract provided a “grace period” of 30 days for such return, in the event plaintiff’s option was not renewed. As hereinafter noted plaintiff had exercised its option prior to this refusal to deliver.

days' inventory was 1655 cases and, with the shipment, would have been increased to 2122 cases; however, the same data (T100) shows sales for the preceding year of 1139 cases, during the month of December, which would have resulted in a net inventory of only 983 cases, had the delivery been made (T100).

Defendant's showing further ignores the fact of common knowledge that the sales of consumer's goods, particularly including alcoholic beverages, during the month of December and particularly following the 15th day of that month exceeds the rate of sales in any other period during the year; and further ignores the practice, of common knowledge and official recognition, of quantity sales requiring assortment of sizes and products (paragraphs 99, 100 and 101 of California Administrative Code, Title IV, in part) :

“Distilled spirits included within a single fair trade contract *may be assorted for quantity discounts * * **. Quantity discounts may be based on sales and deliveries to one purchaser within 24 hours only.”

Defendant's showing further ignores the provisions of Paragraph 12 of the contract (Appendix) which permitted the plaintiff a period of 30 days after December 31, 1952, in which to dispose of plaintiff's remaining inventory of this merchandise, in the event the contract were not renewed. (See the third separate defense to plaintiff's second cause of action (T20).)

As a fourth separate defense defendant purported to reassert its claim of “illegality” of the provision of

the agreement relating to "promotions" (T21) as a special defense to a second cause of action; and, as a fifth special defense, averred as "in mitigation of damages" a subsequent return⁷ by plaintiff to defendant of an inventory remaining on hand of February 1953 in the amount of 740 cases.

The findings (T40) recite that the facts as alleged in paragraph II of plaintiff's second cause of action to be true and

"that it is true that on December 15, 1952, plaintiff executed and delivered to Calvert Distillers Corporation a written purchase order requesting shipment of 900 cases of various sizes of the products of Calvert Distillers Corporation; and that it is true that Calvert Distillers Corporation did not ship and deliver to the plaintiff the 900 cases of products ordered . . . but that it is untrue that Calvert Distillers Corporation did not have a lawful reason for not shipping to plaintiff the products requested in its order * * *";

and

"That the allegations contained in paragraph II of defendant's second * * * defense of plaintiff's second alleged cause of action are, and each of them is true."

The only conclusions of law responsive to this subject matter is conclusions I (T41) to the effect that Calvert had not violated the written agreement in any respect.

⁷Because this lot was a broken line of merchandise, plaintiff was required by the act (section 24751) to offer such return as a condition to disposing of the odd lot as a "close out".

3. Third Cause of Action.

In plaintiff's third cause of action (T9-13) the allegations contained in first cause of action, excepting paragraphs IX and X, are realleged by reference.

The second paragraph of this cause of action alleges full compliance and performance on plaintiff's part (T10).

The third paragraph of this cause of action alleges as follows (T10-11):

“The written agreement between the parties hereto dated March 14, 1952 and hereinabove referred to included a provision therein reading as follows:

11. This contract shall be effective for a period of ten months, from March 1, 1952. If distributor desires to renew the contract, he shall notify Calvert not less than 30 days before December 31st 1952.

The foregoing provisions of the said agreement was intended by the parties thereto to mean, and was interpreted by the plaintiff to mean that in the event the said agreement was then in full force and effect and the Key Distributing Co. desired to renew and extend the said agreement, it had the sole and exclusive option to so extend and renew the same upon giving defendants not less than 30 days' notice of such intention prior to December 31, 1952.”

The fourth paragraph of this cause of action alleges plaintiff's election to renew the contract in accordance with the provisions of the contract immediately above quoted, the giving of notice of such election,

including by reference the written notice (appended to the complaint as Exhibit 3).

The fifth paragraph alleges defendant's refusal to recognize plaintiff's exercise of the option and defendant's repudiation of the contract insofar as related to plaintiff's option to renew, together with plaintiff's ability and willingness to continue performance of the contract created by the exercise of its option. The concluding paragraph (T12) alleges plaintiff's damages suffered by reason of defendant's repudiation of the contract's respect to the option to renew the contract for an additional period.

Defendant's answer realleges its responses to the allegations included in the third cause of action by reference (T23) and (T22; T23-24) and set forth the following admissions:

“ . . . defendant admits that the written agreement between the parties, dated March 14, 1952, included the provision set forth in said paragraph III; * * * *defendant admits that the said provision was interpreted by plaintiff to mean that in the event the said agreement was then in full force and effect and the Key Distributing Co. desired to renew and extend the said agreement, it had the sole and exclusive option to so extend and renew the same upon giving defendant not less than thirty (30) days' notice of such intention prior to December 13, 1952; * * * defendant admits it received the letter attached to the complaint as 'Exhibit 3' while the agreement of March 14, 1952 was still in full force and effect; * * * defendant admits that it has not renewed the agreement between the parties, dated March 14, 1952.*”

By way of special defenses to the third cause of action (T25-27) defendant asserted (T25) as follows:

“* * * that said provision was intended by the parties to mean that in the event the agreement was then in full force and effect and the Key Distributing Co. desired to renew said agreement, it was to apply for said renewal by giving notice to defendant of its desire to renew not less than thirty (30) days prior to December 31, 1952, and that thereafter the defendant had the right to accept or reject said application for renewal; that said provision did not confer and was not intended by the parties to confer upon plaintiff the right to renew said agreement;”

and purported to reassert the purported “illegality” defense earlier noted, stating in part:

“* * * defendant avers that *said written agreement was at all times mentioned in plaintiff’s third alleged cause of action and still is illegal, null and void* because it is and at all times mentioned in plaintiff’s complaint was unlawful for the defendant under the licenses which it holds * * * to solicit or obtain orders * * *”.

Defendant offered no evidence upon this subject matter.

The only findings responsive to the subject matter of the third cause of action are set forth in findings X and XI (T40-41) to the effect that the contract contained the provisions of paragraph 11 and the following:

“It is untrue that the provisions of paragraph 11 of the contract between Calvert Distillers Corporation and plaintiff dated March 14, 1952, were

intended by the parties to mean that in the event the said agreement was then in full force and effect and Key Distributing Co. desired to renew the said agreement, it had the sole and exclusive option to so extend and renew the same upon giving Calvert Distillers Corporation not less than 30 days' notice of such intention prior to December 31, 1952."

The only conclusions of law responsive to the subject matter are contained in conclusions II, III and IV to the effect that the contract "terminated by its terms on December 31, 1952," the provisions of paragraph XI of the contract "did not give plaintiff an option to renew said contract and "the contract pleaded in plaintiff's complaint and relied upon by plaintiff in this action was and is illegal, null and void."

* * *

B. THE FINDINGS, CONCLUSIONS AND JUDGMENT AS RELATED TO THE EVIDENCE AND THE ISSUES.

It is clear from the record that the decision below was actually made upon the repetitive motions of defendant directed at plaintiff's complaint and defendant's "special" defenses; and the determination to attempt resolution of the issues upon a purportedly factual basis resulted from the realization that defendant's admissions had eliminated most of the material issues and plaintiff had proffered proof to sustain its case upon the remaining contested issues (T33-34, written motion to dismiss, T137-140, oral motion and

tentative ruling, T145-146 and 148-152, discussion and direction to prepare findings).

The latter colloquy and direction to prepare findings "on the merits" is, in part (T140, 149-150, 152):

"The Court: *I would like to have these motions that you have indicated typed and tomorrow morning I will dispose of the case.*

"Mr. Ehrlich: Thank you. . . ."

* * *

"The Court: *I have in mind this record and a judgment on this record. With the energy your opponent has here, I am sure he is going across the hall, and I don't want to engage in an idle act here. That is all I am thinking about.*

* * *

"I think a proper record should be made here and *I am not altogether satisfied with this record, disposing of it on the motion itself.* However if that is your position, I will have to act.

"Mr. Ehrlich: The thought occurred to me I would like to consider whether I should ask for a judgment in view of the fact that we did submit some evidence on our side in connection with the pretrial.

* * *

"The Court: That is what I had in mind. I want to get up a proper record here and give both sides an equal opportunity.

"Mr. Ehrlich: What I am concerned about now is the fact that *we did introduce on our part these admissions from the interrogatories, and it might be considered that we did put in evidence. Accordingly, I think we ought to comply with Rule 21 and have a judgment on the merits.*

“The Court: If you are not satisfied with that, I will open up this case and give either side an opportunity.

“Mr. Ehrlich: *I am satisfied with our record. I have no further proof.*”

“The Court: Prepare the judgment in accordance with the rules I just called your attention to—judgment and findings.

“Mr. Ehrlich: For the defendant, your Honor.

“The Court: Yes. . . .”

To the proposed findings and judgment (T38-43) plaintiff filed formal and detailed objections (T35-38), which were overruled—even as to the findings and conclusions to the further effect that plaintiff was not damaged by the occurrences set forth in the complaint (finding XII, T41, and conclusions V, T42), although this issue and subject matter were expressly reserved by the stipulation of the parties approved by the Court below (T151-152).

As conclusions of law, it was declared generally that: (1) the contract was not breached by Calvert . . . in any respect”; (2) the contract “terminated by its terms on December 31, 1952”; (3) the contract “did not give plaintiff an option to renew said contract”; and (4) the “contract pleaded in plaintiff’s complaint and relied upon by plaintiff in this action is illegal, null and void” (T41-42).

The final conclusion (par. V, T41) and the judgment (T43) are that plaintiff take nothing by the action.

PART THREE.**SPECIFICATION OF ERRORS.**

Categorically, plaintiff respectfully specifies error in each of the rulings of the trial Court reserved to it by Rule 31 of the rules and to each of the objections and specifications set forth in its written objections (T35-38) to the proposed findings, conclusions and judgment, and statement of points and designation of record below (T45-46).

In accordance with subdivision (d) of Rule 18, Rules of Practice in this Court, plaintiff respectfully specifies the following errors as particularly relied upon for reversal herein of the instant judgment, namely:

I.

The judgment is erroneous and contrary to law in denying relief required by substantive statutory enactments and rules of judicial decision of the state and applicable to the admitted and established facts;

II.

The material findings are contrary to the evidence in the cause with respect to each material issue presented by the pleadings, evidence, stipulations and submissions of the parties, particularly including findings IV, V, VIII, IX, XI, and XII (T39-41);

III.

Material findings are outside of, and do not respond to, the material issues, particularly including findings V, VIII, IX and XII (T40-41);

IV.

Findings V, VIII, IX and XI are conclusions of law and are without support in the findings or in the evidence (T40-41);

V.

The judgment (T43) is not supported by the findings;

VI.

The conclusions of law (T41-42) are not supported by the findings, evidence or pleadings;

VII.

The conclusions of law (T91-92) erroneously state the principles of law (A) adverted to therein; (B) related to the issues and evidence and (C) related to the findings;

VIII.

The conclusions of law do not support the judgment; and

IX.

Plaintiff was prevented from having a fair trial and was materially prejudiced by the sustaining of defendant's objections (A) to the receipt in evidence of the interrogatories and answers of the parties, (B) to the receipt of evidence relating to the interpretation of the contract, and (C) to the motion for leave to file amendments of the complaint to conform to the proof received in the trial of this cause.

PART FOUR.
ARGUMENT AND AUTHORITIES.

I.

SUMMARY OF ARGUMENT.

For such assistance as it may be in pointing up the outline of principle and authorities following, we briefly recapitulate the factual situation as established by the record and uncontradicted evidence detailed in the brief statement of the case, Part Two, II, supra.

At the outset, it must be recognized that the cause was not resolved upon the theory and basis on which it was subjectively determined, but on patently insupportable motions based upon a disconnected and unsustainable claim of "illegality" advanced by defendant to a contract having been (1) prepared (2) executed and (3) expressly (and so far successfully) asserted by defendant in defense of each cause of action based upon the same contract.

In consequence, a pervading sense of unreality inheres in the findings, conclusions and the concluding portions of the trial, hence we proceed to the principal elements of the case as set forth in the pleadings and as actually tried.

The instant type of contract and the business relationship thereby created has become one of the most common in merchandising in this country.

See Professor Williston's (4th edition) work on contracts, Section 1027A, and authorities cited.

Since this relationship has been authoritatively analyzed in respect to this immediate field of merchan-

dising, at the same place and time as herein involved, in the case of

J. C. Millett Co. v. Park & Tilford, etc., supra,
(123 F.S. 484),

we take the liberty of brief quotation from that opinion of certain aspects of the industry background and business purposes of the instant parties, in lieu of original statement, namely (pp. 486-490, 492, 495):

“The major issues in this suit hinge upon the character of the relationship of the parties under which it is conceded plaintiff bought defendant’s products as a wholesaler and resold them to retail outlets. It is likewise agreed by both parties that this relationship existed for only about seven months and was terminated by the defendant.

* * *

“Both parties were represented by men of long experience in the liquor business. Very few details were discussed but plaintiff expressly agreed to take on the ‘distributorship’ of defendant’s products.

“The factual setting of the parties and the condition of the industry at that time must necessarily be set out if the discussions are to be understood.

“Plaintiff, J. C. Millett Company (hereinafter referred to as Millett) is a California Corporation licensed as a wholesale distributor and importer of alcoholic beverages which has been actively engaged in the business since the repeal of prohibition.

“Defendant . . . manufactures and imports from abroad, alcoholic beverages. *Its products are trade*

marked and such products are unavailable under such trade names from any other source. It engages in business in California and in this District.

“Millett, in common with other liquor distributors in Northern California distributed various ‘lines’ of alcoholic beverages. Within the trade a ‘line’ is the aggregate of various types of distilled spirits bottled in different sizes, which are sold in a group to a wholesaler by a particular distiller.

“In late 1950 and in 1951 the liquor distributing business was in a critical and transitional period. Competition was keen. It was a buyer’s market. Prior to this time most distributors in this area had done business without any written contracts regarding duration or termination of their distributorships.

* * *

“During this period distillers were changing their distributors.

* * *

It was in this posture that discussions . . . began.

* * *

“Millett began to sell Park & Tilford products at each of their branches. Monthly depletion reports showing the amounts of each particular item sold were sent to Herting. This is normal procedure in the trade. Loviner and Herting discussed ways of making the depletion greater. *Millett ordered merchandise from Park & Tilford to fill up its supply of depleted items.*

* * *

“Secondly, and more important, contracts are often formed between business men of long experi-

ence in the trade and familiar with the relationship which they are undertaking, without explicit discussions of the details of promised performance. *The parties here expressly, in words, agreed that Millett was to undertake the 'distributorship' of Park & Tilford Products within a specified area. They all understood from the discussions that the arrangement was not a single sale but that it was to continue. The understanding in the trade as to what a distributorship encompasses, its economic function and business purpose, and the later actions of the parties in pursuing this relation before any disagreement arose are all entitled to great weight in determining their respective undertakings.*

* * *

“Park & Tilford’s economic life is dependent upon the sale of its products. In this highly competitive business the wholesaler’s function is a necessity.

* * *

“The further development of a market for Park & Tilford products was of the essence of the agreement. Not only is this the economic *sine qua non* of the distributorship relation but it was so understood in the trade. The acts of the parties were designed to further it. The depletion reports and discussions between the parties about them, the orders to fill the depletions, the dissemination of Park & Tilford’s market policies to its distributors, the help given Millett by Herting and the sales representative, were directed toward this end.

* * *

“It is clear that Millett promised to do more than buy whatever amount of liquor it desired.

* * *

“Clearly implied was a covenant on the part of Park & Tilford to sell and upon the part of Millett to purchase and keep on hand a supply sufficient to meet the demand of this market.

* * *

“The distributorship contract in the case at bar is more than a contract of employment or agency. It is also a contract of sale. On the other hand, it is more than a mere sales contract. It partakes of the substantial aspects of both.

* * *

“Park & Tilford’s repudiation of the agreement was a substantial breach of the contract and Millett is entitled to damages.”

In this practical background the instant contract was made and Calvert’s breaches of three independent covenants of the contract occurred.

The first of these breaches was of the undertaking, on Calvert’s part (par. 6, appendix)—

“. . . to promote the sales of its products and to advertise its products in a manner consistent with the type of merchandise and the cases sold.”

Industry usage, custom and common understanding is that “promotion” means (1) direct and individual selling activities by distillers “specialty” salesmen to induce offers to purchase by retail licensees and (2) submission of all offers to purchase so induced to the distiller’s distributor in the area. Defendant’s admissions and the testimony establish that such “promotion” was carried out by Calvert, in general, and with respect to plaintiff, also—until the summer of 1952.

The proof is that such promotional activities in support of plaintiff's functions as a Calvert distributor were discontinued during the last seven months of the original contract period and, further, Calvert violated the coterminous negative covenant, of refraining from depriving plaintiff of the benefits of the contract, by using such "promotional" personnel and activities to divert plaintiff's custom to the competing Calvert distributor, Julliard, by—"a trick of the trade. It's a way to emphasize one and de-emphasize the other."

The issue was fully presented and proved, and, with damages presumed and proof thereon reserved by approved stipulation, there was no means of avoiding a plaintiff's judgment upon the first cause of action.

The only pretended excuse for these conscious and systematic defaults is the assertion that such promotional activities as were undertaken by Calvert in its own contract violates some un-identified state law in some undisclosed manner to render the particular covenant, and the entire agreement, "illegal, null and void."

Reason miscarried and findings and judgment proceeded to non-suit, not only this severable undertaking—but the entire case as well!

To the contrary, the state act expressly exempted and authorized such promotional activities including "soliciting of orders for distilled spirits within the state" by "agents and employees of a distilled spirits manufacturer."

The official interpretation of the statutory exemption, the state licensing and enforcement agency, and

that of all other Courts to date, has been that the universal custom of the trade in the identical practice is lawful. Today and always, defendant and Calvert, along with all other such licensees, have solicited myriad such orders through large numbers of "specialty men" employed for no other purpose and who perform no other function.

No part of the record, nor any principle of state law or Federal procedure, can be marshalled to support—either the findings, or the rulings, below upon this subject matter.

Calvert's second breach was of the independent undertaking (par. 5 appendix) that it "agrees to supply its products to Distributor to the best of Calvert's ability," whereas, it is admitted that it refused to supply 900 cases, timely and properly ordered in accordance with the contract and admittedly during its minimum effective period. The express admissions to this cause of action, alone, compelled a plaintiff's judgment—unless defendant could plead and prove some lawful avoidance to its confession of this breach. This it did not do.

The only counterpoints proposed by defendant (other than the ubiquitous "illegality" claim) are that (1) the delivery of the 900 cases would result in an excessive inventory, which was not factually sustained, generally, and further omitted the essentials of (a) establishing the date of arrival and the extent of inventory upon date of anticipated arrival (b) assortment necessary to quantity purchases and (2) ignored the facts that (a) plaintiff had already exercised its

option to renew the contract and (b), in all events, had 46 days after the order within which to continue the resale of Calvert products.

No objective view of this record will permit any conclusion than that Calvert's refusal to fill this order was motivated by its purpose of depriving plaintiff of every right and benefit to accrue to it under the contract—further evidenced by its delicts in respect to its obligation to promote its products in plaintiff's behalf—systematically violated for some six and one-half months—and its subsequent repudiation of the renewal undertaking.

Again the judicial process short-circuited and the "finding" is contrary to the express admissions of defendant and to the uncontradicted evidence supporting recovery for this breach, i.e., the conclusionary negative pregnant "that it is untrue that Calvert . . . did not have a lawful reason for not shipping" (T40, "finding" VIII).

There is thus no finding whatever of any fact to evade the admissions and evidence on this cause of action.

If it could be assumed that the record could possibly be marshalled to support a finding, if made, adverse to plaintiff upon the purported "special defenses" to the second cause of action, those claims are nevertheless obviated by the fact of plaintiff's exercise of its option to continue the contract for the renewed period, wherein the duty to supply its products was a continuing and unfettered obligation of Calvert.

Calvert's third breach of the contract was its repudiation of the renewed contract for the succeeding period accomplished by plaintiff's exercise of its option to renew.

There is no possible dispute as to these issues, as factual issues, and the adverse judgment has proceeded upon an erroneous interpretation of the contract and in disregard of the plain wording of the renewal provision, of established rules of construction, and of the applicable rules of decision respecting the effect of the admissions and evidence pertinent to such interpretations.

The only "special defenses" are the repeated assertion that (1) Calvert and defendant are systematic law breakers and (2) an interpretative statement that the contract does not mean what it says.

In connection with the latter claim, it is noteworthy that the statement hinges upon a precise verbal misstatement of the wording of the renewal clause, itself, by the persistent substitution of the phrase "*apply for said renewal*" in the place of the actual wording of the contract, i.e., "*to renew the contract, he shall so notify Calvert*" (T25).

It should be further noted that the cause was tried and submitted upon *the crucial admission that the contract* (which Calvert drew) *was interpreted by plaintiff to mean that plaintiff did have the option to renew, as set forth in the contract, and it is nowhere suggested that such interpretation was an unreasonable one.*

Since all evidence relating to this subject was objected to by defendant, there is no basis for an adverse finding of *intention* (T41, “finding” XI), *contrary to the wording of the contract and such express admissions*.

The conclusionary “finding” (T41) and the conclusion (T42, No. III) are contrary to state law, and the judgment is thus without support.

Finally, plaintiff was deprived of a fair trial upon issues and evidence by the erroneous determination to dismiss upon defendant’s contrived and inapplicable “illegality” theory, to which the findings were applied as a facade; it was a disservice to the Court and to the cause to “dispose of the case” (T140) without the required resolution of the issues actually presented.

II.

ARGUMENT AND AUTHORITIES, AS RELATED TO SPECIFIC ERRORS REQUIRING REVERSAL OF THE JUDGMENT.

- A. THE JUDGMENT IS ERRONEOUS AND CONTRARY TO LAW IN DENYING RELIEF UPON EACH CAUSE OF ACTION SET FORTH IN THE COMPLAINT.
1. Plaintiff Alleged and Proved Defendant’s Obligation to Promote Its Products and the Breach of That Obligation Under the First Cause of Action.

It would seem incontestible that Calvert expressly bound itself by the agreement to “promote its products” as contemplated by the contract.

a. The Obligation "To Promote" Defined.

Calvert did not choose to define its obligation "to promote" in the contract and the scope and meaning of that expression must be spelled out by evidence *de hors* and by the integrated custom of the industry as recorded in *Park & Tilford*, supra (123 F.S. 484, 488, as above quoted), i.e.,

"As is normal in the industry, this sales representative called upon retailers to solicit orders for [defendant's] distributors."

Evidence of usage and custom as an aid to interpretation is made admissible by Section 1870 of the California Code of Civil Procedure, which provides, in part:

"In conformity with the preceding provisions, evidence may be given . . .

* * *

"12. Usage, to explain the true character of an act, contract, or instrument, where such true character is not otherwise plain; but usage is never admissible, except as an instrument of interpretation";

The California rule of decision relative to this question is summarized in the recent case of

Guipre v. Kurt Hitke & Co., supra (109 C.A. (2d) 7, 14, 240 P. (2d) 312);

as follows:

". . . When there is a known usage of trade, persons carrying on that trade are deemed to have contracted in reference to the usage, unless the contrary appears; and *the usage forms a part of*

the contract. Evidence of usage is always admissible to supply a deficiency or as a means of interpretation where it does not alter or vary the terms of the contract (Watson Land Co. v. Rio Grande Oil Co., 61 Cal. App. 2d, 269, 272 [142 P. 2d, 950]).”

It is further the rule of decision in California that a contract is presumed to have been made in contemplation with industry customs of the locality of performance and that such custom need not be alleged, summarized in—

Covely v. C.A.B. Construction Co., supra (110 C.A. (2d) 30, 33, 242 P. (2d) 87 (Hearing Supreme Court, denied).

“(1) A contract may be interpreted in accordance with the usage of the place of its performance (Code Civ. Proc., sec. 1870, subsec. 12);

“(2) Knowledge of the custom on the part of the contracting parties is presumed from the fact that they are in the business or trade in which the custom exists (*Watson Land Co. v. Rio Grande Oil Co.*, 61 Cal. App. 2d 269, 272 [42 P. 2d 950]; *Hind v. Oriental Products Co.*, 195 Cal. 655, 667 [235 P. 438]).

“(3) It is not necessary to plead a custom or usage where it is so general that it is presumed to have been known by the parties to a contract (*Todd v. Meserve*, 93 Cal. App. 370, 381 [269 P. 710]).

“Applying the foregoing rules to the facts in the present case the evidence which was admitted was of a general custom and usage in the trade. There-

fore it was properly admitted for the purpose of determining the extent and control of the lessee over the operator of the equipment leased upon a wholly equipped 'operated and maintained' basis."

In

Brogdex Co. v. Walcott, 123 C.A. (2d) 575, 581, 267 P. (2d) 28 (Hearing Supreme Court, denied),

the Court was concerned with a precisely comparable factual situation with respect to the distribution of a patented wax process used in fresh fruit marketing.

In upholding a declaratory judgment and orders requiring an accounting, the Court stated the California substantive rules to be here applied as follows (p. 581):

"And, as stated by this Court in *Brawley v. Crosby, etc. Foundation, Inc.*, 73 Cal. App. 2d 103, 112 [166 P. 2d 392]: 'In this, as in every contract, there is the implied covenant of good faith and fair dealing: that neither party will do anything that would result in injuring or destroying the right of the other to enjoy the fruits of the agreement (Citation of authorities). The law will therefore imply that under its agreement appellant was obligated in good faith and by its reasonable and best efforts to develop, exploit, produce and make sales of the rotary pump in question.' See also *Matzen v. Horwitz*, 102 Cal. App. 2d 884, 892 [228 P. 2d 841].

". . . Therefore, when appellant Cunning became an employee of Johnson in work antagonistic to and in competition with that of respondent, he breached the implied obligation of the agreement

to deal fairly and in good faith with respondent, thereby justifying its termination."

In the recent case of

Kennerson v. Salih Bros., 123 C.A. (2d) 371,
373, 266 P. (2d) 871,

the Court was confronted with the same problem of determining the true intent of the parties *in using "promotion" in a written contract* for the "promotion" of corporate stock. The identical contention of the instant defendant was there summarized by the Court as follows:

"Plaintiff claims it was a violation of the parol evidence rule to admit extrinsic evidence concerning the 'services which you [plaintiff] rendered in the promotion . . . ' of the corporations mentioned. He says this letter, signed by the parties is a writing which integrated and expressed the agreed terms, conditions and covenants of the contract and superseded the antecedent oral negotiations, discussions and understandings of the parties. . . ."

In affirming the judgment supported by a finding based on "extrinsic evidence" received upon overruling such objection, the Court summarizes the California rule, namely (p. 373):

"What did the parties mean by the expression 'services which you rendered in the promotion' of the two corporations? That language is not clear and explicit. The words 'services' and 'promotion,' in that context, have no definite and certain meaning. The parties differ as to the meaning. A court cannot resolve the conflict without the aid of ex-

trinsic evidence. This situation is like that which obtained in *Wachs v. Wachs*, 11 Cal. 2d 322, 325-326 [79 P. 2d 1085], where the like use of extrinsic evidence was sanctioned.”

In a most recent reexamination of the same contention, i.e.—

“It is argued that this contract is unambiguous and contains no such provisions, and that under the parol evidence rule evidence was not admissible for the purpose of adding a provision which was not even mentioned in the agreement.”

in the case of

Alder v. Campbell, 126 C.A. (2d) 421, 424, 425, 272 P. (2d) 115 (Hearing Supreme Court, denied),

the Court stated the California rule applicable to that contention as follows:

“... the contract is entirely silent with respect to what should happen in the event no such building operations should be carried on. In this situation *the court admitted evidence with respect to the intention of the parties in this regard*, at the time the contract was entered into. The evidence received in that connection amply supports the findings complained of. *That evidence was not admitted to vary the terms of a written contract and did not serve that purpose. It was admitted for the purpose of determining the true intent of the parties with respect to a matter on which the contract is entirely silent.* Under well established rules, that evidence was admissible (Citation of authorities). This evidence, with the contract itself, supports the findings made.”

It is thus too patent to justify further citation that the intendment of the undefined words "promote" and "sales promotion," as expressly undertaken by Calvert in support of plaintiff's distributorship, is that alleged in the first count of plaintiff's complaint and established by the uniform custom of the trade as judicially determined (123 F.S. 484, 488) *and the testimony received in this cause.*

Procedurally, it was manifestly erroneous for the Court below to ignore this evidence and this custom and grant defendant's motion, *sub nomine* findings and judgment, in defiance of the judicial policy repeatedly declared by the Supreme Court and succinctly reiterated, in reversing a summary judgment interpreting a contract, in the case of

Kennedy v. Silas Mason Company, 334 U.S. 249,
255, 257, 92 L. ed. 1347, 1350, 1351;

namely:

" . . . There is substantial controversy as to the way those two parties, the Government and defendant in actual practice, construed their contracts, both sides of the controversy being based on events of which we are asked to take judicial notice or *to spell out from contracts without the tests which trial affords.* . . .

* * *

" . . . While we might be able, on the present record to reach a conclusion that would decide the case, *it might well be found later to be lacking in the thoroughness that should precede judgment of this importance and which it is the purpose of the judicial process to provide.*"

It is respectfully submitted that this record requires findings and judgment that Calvert's obligation was to furnish and carry out services described by witness Lewis in his testimony and the custom of the trade at the place and time set forth in the first cause of action, and this obligation was violated by Calvert, by withdrawal of such promotion and service in plaintiff's behalf; and, in addition, breached the negative obligation⁸ not to use these efforts to frustrate plaintiff's additional sales to the retail outlets; and for these reasons the judgment must be reversed for a new trial upon the issues presented by the first cause of action.

b. Defendant's Pretended Special Defense of "Illegality" Is Not Sustained or sustainable.

This claim violates every rule of decision to be found in the reported cases.

First, no such claim was procedurally reserved or factually supported and these questions may be passed until defendant has advanced some rehabilitation of its presentation and the judgment obtained by such means.

Secondly, and of controlling importance, the claim is non-existent because the precise practice of "soliciting orders", on which alone the claim is bottomed, is

⁸These obligations are also imposed by state common law and by state and Federal statutes proscribing discriminatory treatment of trade buyers similarly situated, and other acts of unfair competition.

Buxbom v. Smith, 23 Cal. (2d) 535, 540, 541, 548, 145 P. (2d) 305;

Callman, Unfair Competition and Trade Marks, Sec. 33, pp. 587-588 and cases cited (2nd ed.), 1 P. (2d) 140.

specifically exempted from all restrictions by the express exemption of the licensing statute itself (section 23,773, above quoted) which declares that the statutory license restrictions “do not prevent . . . soliciting orders”!

The official interpretation of the latter exemption for such “soliciting of orders” is that the exemption means what its plain language declares.

The licensing agency (State Board of Equalization Order 129 a, January 10, 1940) interpreted this exemption for such soliciting of orders, in part as follows:

“Persons who are the holders of distilled spirits manufacturers’ agents’ licenses may have *promotional* representatives call upon the retail trade. They may not, *however*, receive *signed* orders for distilled spirits from the retail trade.

“There has been some confusion in regard to this problem for the reason that Section 23773 of the act provides that this provision shall not be deemed to prevent agents or employees of distilled spirits manufacturers located outside this State from soliciting orders for distilled spirits within the State. . . .” (Official emphasis.)

(Liquor Control Law Service, Commerce Clearing House, California, par. 2101, Note 55.)

In the *Park & Tilford* case, *supra*, (123 F.S. 484, 496) the Court expressly declared that such solicitation was not unlawful, as an act of unfair competition, and denied relief as to claims based upon the instant claim of this defendant.

In the recent case of

Alpha Distributing Co. v. Jas. Barclay & Co.,
215 F. (2d) 510,

this Court affirmed the denial of injunctive relief sought upon the instant defendant's claim of "illegality".

The same ruling was made on the same claim by the Court below in the *Park & Tilford* case and the case of

Better Brands v. The Fleischman Distillery Co.
(District Court Number 31,811, Civil).

Defendant failed to cite to the Court below a single precedent, even *nisi prius*, for its specious "interpretation" of the act and plaintiff has discovered none. The express exemption of such soliciting of such orders from such other provisions of the act as might have impinged upon that license privilege was a matter exclusively within the police power of the state and the legislative jurisdiction of its law-making body. That legislative power has functioned and that ends the argument.

The Court below was required to accept the state law upon this subject matter, a mere distribution of license privileges.

See the leading case of

Colgate-Palmolive-Peet Co. v. National L.R.
Bd., 338 U.S. 355, 361, 363; 94 L. ed. 161, 168,
169

in part,

"... We therefore also look to the law of the state where the closed-shop contract was made,

here in California, to determine its validity. We think it is clear, and do not understand the Board to contend otherwise, that the closed-shop *contract was valid under California law.*

* * *

“... The Board cannot ignore the plain provisions of a valid contract made in accordance with the letter and the spirit of the statute and reform it to conform to the Board’s idea of correct policy....”

No judgment should adopt the unprecedented and unsupported *ipse dixit* of a contesting litigant, certainly not one that flies in the face of an express statutory declaration of legislative policy precisely to the contrary—as this judgment does.

Moreover, defendant is in no position to raise any point of “illegality” with respect to this subject matter.

See the case of

Hill v. The Progress Co., 79 Cal. App. (2d)
771, 779, 180 P. (2d) 956

in part,

“*The shipper defendants herein are hardly in a position to challenge the right of plaintiff to enforce his claimed contract upon the ground that he is a ‘highway contract carrier’ without the requisite permit, when they not only expressly deny the existence of any contract that could be the basis of this class of carrier but by their own conduct in hiring numerous other truckers to haul the merchandise claimed to be covered by the private contract have violated and disregarded its terms, with the acquiescence and sufferance of the*

carrier, and under the construction of the act above quoted, thereby conceded that plaintiff was not a contract highway carrier. Under these conditions we are unable to agree that plaintiff is prevented from maintaining his action because of any illegality of his contract.”

This defendant is in precisely the same position as the unsuccessful plaintiff in the leading case of

Partmar Corp. v. Paramount Theatres Corp.,
347 U.S. 89, 95, 98; 98 L. ed. 532, 539, 541,
74 S. Ct. 414

wherein illegality had been conclusively shown, but the claim of illegality of the contract was rejected when asserted as a means of aggrandizement to one of the guilty party who sought, in the immediate case, to avoid its contract.

The ruling, in part, was:

“. . . the case went to trial without amendment of the pleadings . . . on two issues: whether Paramount was justified in terminating the franchise agreement because of the decree in the New York Paramount case, *supra*; whether the lease and contract were illegal contracts under the federal antitrust statutes justifying repossession of the theatre by Paramount under California law. See e.g. *Glos v. McBride*, 47 Cal. App. 688, 191 P. 67. Thus issue was joined as to the legality of the actions of Paramount and its alleged co-conspirators relative to the lease and franchise agreement, wholly apart from the New York injunction, and *Paramount was in the anomalous position of attempting to prove that its agreements with Partmar violated the antitrust laws.* Paramount did

not limit its contention of illegality of the agreement to nonconspiratorial aspects of the antitrust laws but argues that if the agreements were illegal in any way it had the right to possession. . . .”

* * *

“The court simultaneously entered an order giving judgment for Partmar on Paramount’s two counts of unlawful detainer. . . .

* * *

“... *declaring the lease and franchise to be valid and subsisting and the theatre not to be unlawfully detained.* Therefore those parts of the judgment must be accepted as valid and binding on the parties. . . .”

Calvert expressly undertook to promote its products and it is proved that it consciously refused to do so, at all times after June of 1952.

We are unable to discern any means of avoiding a holding in plaintiff’s favor on this issue of liability.

It is respectfully submitted that the instant judgment is contrary to controlling substantive law and must be reversed.

2. Calvert’s Obligation to Supply Its Products to Plaintiff and Its Failure to Deliver the 900 Case Order, Are Alleged, Proved and Admitted.

There is no possible defect in plaintiff’s case upon the second cause of action and the only conceivable support for this portion of the judgment, i.e., the pleading and proof of some tenable excuse for the admitted breach of the obligation to supply Calvert products in accordance with the order for 900 cases

(plaintiff's Exhibit 2), admitted to have been delivered "while the contract was in effect" and "pursuant to and in accordance with the terms thereof."

By way of purported "special" defenses (T19-22) defendant designates four claims of a purportedly factual nature.

(a) The first of these claims (second defense) is that Calvert's failure to deliver the 900 cases ordered would have resulted in "an excessive inventory", as described in paragraph 5 of the contract (Appendix).

But there is no averment of any facts to invoke the reservation and *it is not averred that Calvert exercised such right nor that the order was rejected for any such reason.*

The burden of proving this asserted defense was upon defendant and there is no finding of facts to support a holding that it could be sustained.

Fatal to the claim, however, is the absence of any proof (detailed in the statement of the case) to support any finding of "excessive inventory" at the time the order was to be received—because defendant offered no evidence of any kind.

(b) The second of these claims is "that it would have been an idle act . . . to ship because . . . [plaintiff] would have been obligated to return said merchandise."

(c) The next claim is the anomalous argument that Calvert's contract and conduct, in soliciting retailers to purchase Calvert and Carstairs products from Calvert distributors, was criminal—which neces-

sarily implies that defendant may resist plaintiff's lawful claim to damages by asserting Calvert's independent and voluntary misconduct, notwithstanding the maxim that—

“no one can take advantage of his own wrong.”
(Section 3517 of the Civil Code of California).

(d) The concluding (fourth) claim of this nature is that defendant has a “partial defense” to plaintiff's second “alleged cause of action and in mitigation of damages” in that Calvert received and credited the return of the odd-lot and broken-line remnants of plaintiff's Calvert-Carstairs inventory.

It is not apparent how such claim could constitute a defense—“partial”, or entire; and it is plaintiff who is entitled to credit for thus mitigating damages.

Factually, defendant presented no evidence on this subject matter; the answers to interrogatories, if otherwise adequate, omit essential elements of proof necessary to support any affirmative finding upon any such special defense; and, specifically, plaintiff reserved all sub-issues and inferences relative to such answers to interrogatories (T52, 94, 96, 99, 100) in part (T99, 100);

“Mr. Hutchinson: . . . However, these inventory records, as I understand it, *would be shown to relate to the first of the month and not to the 15th, and for that reason we would object to this particular information on the ground that it is incompetent, irrelevant and immaterial, and too remote to the time when the order of December 15, 1952, was placed and the time when it would*

have arrived, the inventory would be different, and that this does not show that."

* * *

"In order to save you time, . . . we will stipulate . . . subject to our objection that there is no issue presented that the order was rejected nor any averment that the order was rejected for that reason."

Patently, statistics⁹—whatever their effect otherwise—are neither "self-executing", nor self-explanatory, and require some foundational showing to prove anything.

Though having the burden of proof and of going forward upon these affirmative issues, none of such "special defenses" were established by defendant.

Section 1981 of the Code of Civil Procedure provides:

"The party holding the affirmative of the issue must produce the evidence to prove it; therefore, the burden of proof lies on the party who would be defeated if no evidence were given on either side."

See also

Ozmo Oil Co. v. Cotton & Co., 278 F. 100;

Johnson Trade Co. v. Frimmersdorf, 100 Cal.

App. (2d) 719, 224 P. (2d) 771;

Sevier v. Roberts, 52 Cal. App. (2d) 403, 126

P. (2d) 380.

⁹It is clearly presumed—

"That *higher evidence would be adverse* from inferior being produced." (Code of Civil Procedure, Sec. 1963, subdiv. 6; *Hann v. Venetian Blind Co.*, 111 Fed. 455.)

However, it is specious to pursue these details because defendant did not act upon any such excuse, *in pais*, or in the presentation¹⁰ below—and these issues were not resolved below, but blanketed in with the even more specious claim of “illegality”.

The most casual examination of this record discloses Calvert did not refuse to supply the 900 cases for any reason or justification—but only to force plaintiff out of Calvert distribution, forecast by the breach of the obligations related to the promotion undertaking above analyzed and culminating in the repudiation of the renewal provision hereinafter considered.

This was made clear by the premature repudiation attempted almost two months earlier (notice of exercise of option to renew plaintiff’s Exhibit 3) in part:

“We are not overlooking the fact that on October 30th, 1952 *your executive vice-president, Mr. Tubie Resnik, stated that it was ‘extremely doubtful’ that you shall renew that contract, but under the contract as made the choice of renewal is ours and we choose to exercise it.*”

Plaintiff’s right to recover upon this breach of the contract for refusal to deliver products ordered during the admitted contract term (sections 1761,

¹⁰The submission (T137) was:

“The first motion is to dismiss the complaint and *the three counts on the ground that the contract which they have pleaded in their complaint is illegal and void and violative of the Constitution, the public policy and the Alcoholic Beverage Act.*”

1763(2), 1786, 1787 and 1796 of the Civil Code) is clear.

Ross v. Frank H. Dunne Co., 119 Cal. App. (2d) 690;

Walpole v. Prefab Mfg. Co., 103 Cal. App. (2d) 472, 260 P. (2d) 104;

Muraka v. Bachrack Bros., 215 F. (2d) 547, 554;

Packard etc. Motors v. Packard etc. Co., 215 F. (2d) 503, 507.

3. **The Contract Contained an Irrevocable Offer, or Option, to Renew the Contract Upon Plaintiff's Election and Notice, as Therein Provided, Which Was Accepted by Plaintiff and Unlawfully Repudiated by Calvert.**

It seems apparent that this element of the case depends upon the resolution of questions of law, alone; the facts are that the contract contained a provision for renewal, which is *admitted to have been interpreted by plaintiff as conferring upon it the right to a renewal* by the giving of the notice therein described; *it is admitted that the notice was given and was timely* (plaintiff's exhibit 3, November 18, 1952); and *it is admitted that the contract created by the acceptance of the offer was not carried out by Calvert.*

It is conceded that Calvert prepared the contract, in a printed form for insertion of identities, dates and other details relative to the situation of each of its distributors, and *it is not found, concluded or claimed that the admitted construction of the contract by plaintiff—as giving it the right of election, or option, to renew—was unreasonable!*

These considerations invoke the universal rules of decision that—

“In case of doubt the court will, in proper cases, follow the construction placed upon the contract by the parties and likewise, in case of doubt, *the Court will construe the words of the contract most strongly against the party who used them in the preparation of the contract.*”

(*James on Option Contracts*, Sec. 122, p. 56);

and

“So also, if an offeror says what he does not mean, in terms and under circumstances that do not apprise the offeree of the discrepancy between intention and expression, *a contract comprising the terms as expressed results from an acceptance. The offeror must stand by what he said, and cannot insist on what he meant, no matter how clearly he can prove the latter.*”

(27 *Harvard Law Review* 644, 645, *Irrevocable Offers*, D. O. McGovney).

This principle has been codified in sections 1580 and 1654 of the Civil Code.

The renewal provision of the contract must be construed as having been intended to mean something and that something is to be determined in the light of

“*The understanding of the ordinary person * * ** the standard which must be used in construing the contract * * *”

Ransom v. Penn Mutual etc. Co., 43 Cal. (2d) 420, 425, 117 P. (2d) 951.

The renewal provision (paragraph 11) reads as follows:

“11. * * * *If Distributor [plaintiff] desires to renew the contract, he shall so notify Calvert not less than 30 days before December 31st, 1952.*”

The alternative obligation upon plaintiff, in the event it did not elect to renew the contract, is stated as follows:

“12. In the event that this contract is *not renewed*, Distributor * * * *will return*¹¹ to Calvert at its invoice price all of the Calvert merchandise remaining in its inventory.”

The recitals of facts in contemplation of the parties at the time of making the contract include the following (p. 1, Appendix 1):

“Whereas, Distributor *desires* to act as a distributor of alcoholic beverages produced by The Calvert Distilling Co., and Carstairs Bros. Distilling Co., Inc., in the State of California.”

The operation of the renewal provision is not clogged by any procedural device, beyond notification; nor by any provision for negotiation between the parties, “consideration”, notice, acceptance, or any other response or action by Calvert in reply to plaintiff’s notice, or any further requirement of action, notice, recordation or other means of accomplishing or establishing the fact of renewal.

¹¹The profitless “return” of property owned and purchased for resale is certainly akin to—perhaps literally—a forfeiture, thus invoking the further rule of construction:

“It is a general and well recognized rule that provisions of a contract will be construed, if possible, to avoid a forfeiture.”

Wagner v. Shapona, 123 Cal. App. (2d) 451, 461, 19 P. (2d) 514.

No further action or communication of any nature, in fact, obtained until the argumentative communication of January 26, 1953 (Plaintiff's Exhibit 4) of defendant's house attorney, some 69 days after the notice invoking the renewal provision had been given.

Each of the terms and conditions of the contract, as renewed, were settled and established, by the contract itself, and required no further action by any party.

Warner Bros. Pictures v. Brodel, infra, (31 C. (2d) 766, 773).

Calvert still retained its privileges of fixing all prices, both of sale and resale (paragraphs 3 and 10), credit and shipping terms (paragraph 4), reservations respecting available supplies (paragraph 5), unilateral termination upon (1) change in ownership and management of plaintiff (paragraph 14), (2) upon plaintiff's undertaking distribution of competitive products (paragraph 9), etc.

By contrast, plaintiff had no reserved right to terminate the renewed contract, by any means, and was continually bound to maintain its reputation, license, sales force, inventory, to devote not less than 23% of its effort and money to Calvert's products, and to refrain from undertaking competitive distribution (paragraphs 7, 8, 2, and 9).

Even in the absence of an express provision for renewal, a leading authority has stated the rule with respect to such distributorship contracts—

“The agreement fairly interpreted gives the agent or distributor *an enforceable option to hold*

the manufacturer for a fixed or reasonable time while remaining free himself to terminate the relation at will.”

Williston, supra, Sec. 1027A,

relying largely upon the decision of this Court in the case of

Kelly-Springfield Tire Co. v. Bobo, 4 F. (2d) 71; (certiorari denied, 268 U.S. 694)

so construing a distributorship contract controlled by California substantive law.

The instant contract was printed and delivered to plaintiff by defendant, rather than negotiated, and as Mr. Williston has pertinently observed (Section 1027A, supra)—

“* * * *Nor must it be overlooked that these elaborate instruments are almost invariably drawn by or on behalf of the manufacturer and presented to the dealer simply for his signature on the dotted line.* The very fact that so frequently this carefully drawn instrument leaves the question of its termination, ‘*an obligation incompletely expressed,*’ and the startling disproportionate burden otherwise cast upon the dealer should here, as in the requirement and output contracts, justify the courts in inferring an intention to bind both parties for at least such time as may be required to demonstrate the cause * * *”

The California rule of decision upon continuing and irrevocable offers to contract is summarized in 12 Cal. Jur (2d) 204, Sec. 15 Contracts, continuing offer, as follows:

“A continuing offer is a proposal made to be accepted within a specific time. A common example of such a continuing offer is an option. In an option contract the optioner stipulates that for a reasonable period he waives the right to revoke the offer. * * * If the optionee does comply, he has rights that he * * * may enforce. *Such election gives rise to a subsequent contract between the parties to perform whatever other acts have been specified in the option contract, and the optionor, or person making the offer, becomes obligated to perform. * * **”

The California rule of decision respecting continuing and irrevocable offers is that no action by the offeror is required, but that the offeror becomes bound to perform the contract to which the offer relates upon upon its acceptance by the offeree.

In the leading case of

Warner Bros. Pictures v. Brodel, supra, (31 C. (2d) 766, 773), 192 P. (2d) 949),

these principles are succinctly stated as follows:

“* * * The creation of the final contract requires no promise or other action by the optionor, for the contract is completed by the acceptance of the irrevocable offer of the optionor by the optionee. *‘The contract has already been made, as far as the optionor is concerned, but is subject to conditions which are removed by the acceptance.’* * * * *Thus the option contract gives the optionee a right against the optionor for performance of the contract to which the option relates upon the exercise of the option, which the optionor cannot defeat by repudiating the*

option. (See McGovney, Irrevocable Offers, 27 Harv. L. Rev. 644, 646, 654, and cases collected in footnote 5, p. 646; Corbin, *Option Contracts*, 23 Yale L. J. 641, 656.) Since the optionor promises to perform the contract to which the option relates, subject to *a condition at the discretion of the optionee*, an option contract involves on the part of the optionor *a unilateral promise to perform the obligations of the contract to which the option relates.* * * *

The instant offer to renew was continuing until 30 days prior to December 31, 1952, and the consideration for continuing that offer was more than ample. The correlative penalty provision of paragraph 12, for a profitless return of the remaining inventory, forced plaintiff to an election and it elected to give notice of renewal and to continue the distributorship.

It cannot be disputed that a contract may be made renewable by its own terms, at the election of one of the parties thereto, and that, in the event of such renewal, the rights and obligations of all parties are continued without change during the new period.

This principle was early adopted in California.

See

Kleinsorge v. Kleinsorge, 133 C. 412, 65 P. 876, and cases cited, wherein it was held (pp. 414-415) namely:

“* * * It is conceded by appellant that it was competent for the parties *to provide for a renewal of the note by its own terms* * * * A fair

construction of the note is, that, *if renewed*, it shall, as to the makers, run for the full year,—i.e., that they shall not have the right to pay it sooner, unless consented to by the holder; *but the renewal also renewed the promise to pay interest monthly, and also renewed the option to the holder to treat the whole note as due if interest was not so paid.* But for this provision of the note the renewal for a year would support appellant's contention; *with the provision the renewed note stood on the same footing as in the first or any subsequent year, and the option to treat it as due and payable on default in payment of interest was available to the holder.*"

See also,

Bergen v. Van Der Steen, 107 C.A. (2d) 8,
236 P. (2d) 613 (Hearing Supreme Court,
denied)

and cases cited.

The parties to the instant contract did provide for the renewal of that contract "by its own terms". There is no term, condition or undertaking of the instant contract which could not be accomplished during the renewal period as readily as in the original period.

As in all such cases, only two elements of an effective renewal provision are essential, i.e., (1) designation of the party to the contract who may invoke the renewal provision and (2) provision of a means of invoking the renewal provision.

The instant renewal provision sets forth each of these essential elements: (1) it is the distributor who

may renew the contract, if he desires; and (2) the means of accomplishing the renewal is by the distributor's notifying "Calvert not less than 30 days before December 31st, 1952" (paragraph 11).

This effect of the renewal provision is further supported by the alternative obligation of the penalty clause for the profitless resale of the remaining inventory set out in paragraph 12. Not only was plaintiff designated as the only party to elect, he was required to elect—one way or the other.

Since each of the terms of the contract was dictated by defendant and plaintiff's performance during the renewal period was to be greatly beneficial to defendant in its only business objective of distribution, there was no room for negotiation and no detriment to defendant to be avoided by reservation of some unstated power of rejection.

It must be recalled that contractual provisions of this nature are common in business usage and more frequently prepared by business men than attorneys—as the instant provision appears to have been.

See,

67 C.J.S. 511, Options,

where this observation is made:

"The word 'option' is a term of business usage rather than of strictly legal nomenclature, and has frequently been used to include indiscriminately conditional sales contracts and mere unsealed offers without consideration, as stated in section 100 on Contracts. However, the very meaning of the word 'option' implies a right to

act or not to act as the optionee may choose, and in this sense the word has been variously defined as meaning the right of choice, the right of election, to exercise a privilege, etc., etc."

There remains, then, only the interpretation of the specific wording of the renewal clause, which turns upon the reasonable intendments of the two crucial phrases of the renewal clause, namely: (a) "if distributor desires to renew" and (b) "he shall so notify Calvert".

- a. Offers, Including Continuing and Irrevocable Offers, Are Necessarily Made to the Desire, Pleasure, Wish, Election, Choice and the Like, of the Offeree.

We suppose it will not be contested that the very nature of offers and proposals—whether revocable or irrevocable—are always, necessarily, and inevitably, addressed to the desire, wish, election, choice, and the like, of the offeree. In all events, the universality of the rule of decision to that effect is such that it would be trite to extend this memorandum with citation of authority to establish that the offer is always so addressed to the offeree.

It is equally established that continuing and irrevocable offers (options) are similarly addressed.

The most recent California decision on the immediate point is that of

Caras v. Parker, 149 A.C.A. 712, 717, 309 P.
(2d) 104

in part,

“* * * Or, stated in another form, it is a right ‘acquired by contract to accept or reject a present offer, within a limited or reasonable time in the future. (21 Am. & Eng. Ency. of Law, p. 924.) When the offer thus made is within the time stipulated, accepted by any sufficient act or words of the party acquiring the right to accept or reject such offer, the transaction between the parties, *ipso facto*, ceases to be an option, but becomes a sale or contract of sale according to the circumstances of the acceptance.’

An option founded upon a valuable consideration cannot be withdrawn or revoked within the time fixed, and it will be binding and obligatory upon the optioner, or his assigns with notice, until it expires by its own limitation. * * *”

For examples of rulings of the state courts upholding “desire options”, see the following:

Dawson v. Goff, 43 Cal. (2d) 310, 315, 273 P. (2d) 1;

Flickinger v. Hecht, 187 Cal. 111, 115, 200 P. 1045;

Flagg v. Andrew Williams Stores, 127 Cal. App. (2d) 165, 176, 177, 273 P. (2d) 294;

Wagner v. Shapona, supra (123 Cal. App. (2d) 451, 455), 19 P. (2d) 514;

Achen v. Pepsi-Cola, etc., Co., 105 Cal. App. (2d) 113, 117, 233 P. (2d) 74.

For examples of similar decision in other states enforcing options addressed such “desire”, “wish”, “election” and the like of the offeree, see the following:

DESIRE.

The effectiveness of an option expressed in terms of desire is adequately demonstrated by the many cases in which such provisions have been upheld and enforced.

As examples, see the following:

Congregation etc. v. Gerbert, 57 N.J.L. 395,
31 Atl. 383:

“* * * said party of the second part that he will let and demise to them the premises hereby demised for a further term of five years * * * and upon the same terms as to amount and payment of rent, in the said party of the second part shall so *desire* and shall give notice hereof at least three months before the expiration of this lease; and further, that if the said party of the second part shall *desire* to purchase the demised premises, that he will at any time during the tenancy * * * sell and convey * * * the demised premises to the said party of the second party, or such person or persons as they shall desire, upon their giving to him * * * notice that they *desire* such conveyance; * * *”

Anderson v. Bills, 335 Ill. 524, 167 N.E. 864:

“Now, therefore, in consideration of the premises * * * A hereby agrees to purchase from B the above described land for ——— dollars at any time within five years from this date, *provided notice is given* by B to A on or before September 1st of any year *that B desires A to take said lands.*¹² * * *”

¹²Set forth as in approved form in

Nichols Cyclopedic of Legal Forms, Annotated, Vol. 7, Section 7.496.

Echternach v. Moncrief, 94 Kan. 754, 147 P.
860:

“* * * It is my *desire* that you purchase * * * 30 shares of stock * * * according to the terms of a certain contract * * * By the terms of this contract you have agreed to purchase this stock four years after its issue if I *desired* to sell.”

Brooks v. Trustee Co., 76 Wash. 589, 136 P.
1152:

“* * * we hereby agree that after you have consulted your sister or any one else in regard to this investment you *desire* to withdraw your investment you may at any time return these bonds * * *”;

In re Lindsay's Estate, 210 Pa. 224, 59 Atl.
1074:

“* * * it is agreed that those of the present stockholders, * * * shall have the option to purchase and acquire the whole of the stock interest of such party so dying or so *desiring* to sell his said interest * * *”;

Casper v. Kalt-Zimmers Mfg. Co., 159 Wis.
517, 149 N. W. 754:

“If at any time any of the original stockholder subscribers hereto *desire* to sell and dispose of their stock, said stockholder or stockholders shall first offer it in writing to the board of directors, stating price and terms and give the board of directors ten days in which to place it with the stockholders. * * *”;

McFarland v. McCormick, 114 Iowa 368, 86 N. W. 369:

“* * * I hereby agree that, in case you fail to dispose of said lots on or before August 15th, 1896, that I will on that date pay to you * * * provided, you *notify* me that you *desire* me so to do ninety (90) days prior to August 15, * * *”;

Carter v. Love, 206 Ill. 310, 69 N. E. 85:

“* * * Now, if the said M. G. Love shall at any time before the expiration of this option so *desire*, I agree, in consideration of the sum of \$9,240 to convey to said M. G. Love, or as he shall direct, * * *”;

In re Wallbridge, 198 N. Y. 234, 91 N. E. 590:

“If any of the residuary legatees *desire to purchase* any of the personal property or real estate owned by me they may do so at its current market price * * * and the same shall be charged against their respective shares or interest as money paid to them by the executors * * *”

ELECTION

Bras v. Sheffield, 49 Kan. 702, 31 P. 306, 33 A.S.R. 386;

Brush v. Beecher, et al., 110 Mich. 597, 68 N. W. 421;

Darling v. Hoban, 83 Mich. 599, 19 N. W. 545.

REQUEST

Beaden v. Bransford, 144 Tenn. 395, 232 S. W. 958.

PRIVILEGE

York County Sav. Bank v. Abbot, 131 Fed. 980,
139 Fed. 988.

DECIDE

Comstock Bros. v. North, 88 Miss. 754, 41 So.
374.

DETERMINATION

Consolidated Coal Co. v. Findley, 128 Iowa 696,
105 N. W. 206.

DEMAND

In the most recent California case to come to our attention,

Dawson v. Goff, supra, (43 A. C. 311, 314, 273 P.
(2d) 1),

the option was expressed in the form of a demand—

“* * * hereby agree to purchase from you * * *
upon *demand* written or verbal * * * not to ex-
ceed forty thousand (40,000) common shares
* * *

“This agreement terminates if no demand is made
on February 28, 1953.”

The Court interpreted the contract as follows (p.
316):

“Assuming the February 28th, 1950, instrument
did not constitute a binding contract for the sale
of the stock because it was lacking in mutual con-
sent and consideration in that plaintiffs did not
promise to sell any stock or any number of shares
to defendants, *yet it could constitute an offer by*

*the buyers (defendants) to buy such number of shares, not exceeding the stated amount, as the sellers (plaintiffs) desired to sell. * * **

The Court concluded that evidence (p. 319) to the extent admissible "may be admissible to throw light on the basis of liability".

See, also,

Solomon Mier Co. v. Hadden, 148 Mich. 488,
111 N. W. 1040, 118 A. S. R. 586.

The foregoing examples should be adequate to demonstrate that in law, as well as in business practice, offers, irrevocable offers, options and similar contractual rights may be expressed in terms of desire. Whenever a party to an instrument has the right, privilege or power to invoke a renewal or other provision therein, the determination must necessarily be a subjective reaction and any words recognizing this power of decision will suffice.

It is obvious that the terms of acceptance need not, and generally do not, require more than a provision for conveying notice to the offeror by the offeree of the fact of acceptance and nothing more was required here.

See,

Warner Bros. Pictures v. Brodel, supra, (31 C. (2d) 766, 773);

Dawson v. Goff, supra, (43 A. C. 311, 318).

The cardinal rule that distributorship contracts are to be given a practical, straightforward business in-

terpretation to accomplish the purposes thereof has been expounded by our ablest jurists.

Mr. Chief Justice Holmes stated for the Court in
Martin v. Meles, 179 Mass. 114, 60 N. E. 397,
398,

that—

“there is the strongest reason for interpreting a business agreement in the sense which will give it a legal support, and such agreements have been so interpreted.”

Mr. Justice Cardozo, in speaking for the Court in enforcing such a contract in

Wood v. Lady Duff-Gordon, 222 N. Y. 88, 118
N. E. 214,

stated that—

“* * * The law has outgrown its primitive state of formalism where the precise word was the sovereign talisman, and every slip was fatal. It takes a broader view today. A *promise may be lacking, and yet the whole writing may be ‘instinct with an obligation,’ imperfectly expressed* (citations). If that is so, there is a contract.”

In

Merchants Life Ins. Co. v. Griswold, 212 S. W.
807 (Tex. Civ. App.),

the Court stated:

“If the contract should be held to be terminable at the *option of Griswold, the time and money expended by him in establishing agencies, the same being in contemplation of the parties when the*

contract was made, constitutes a valid consideration for such option."

In enforcing another such contract, the Court in

Meader v. Incorporated Town of Sibley, 197 Ia. 945, 198 N. W. 72, 74,

said:

"It is a well established rule that if the intention of the parties and the consideration on which an obligation is assumed by one party is that *there shall be a corresponding obligation on the part of the other party, the law will imply such obligation.*"

See, also,

J. C. Millett Co. v. Park & Tilford, supra, (123 F. S. 484);

Kelly-Springfield Tire v. Bobo, supra, (4 Fed. (2d) 71);

Mills-Morris Co. v. Champion Spark Plug Co., supra, (72 F. (2d) 38 (C. C. A. 6) (the latter noted in 23 Col. L. Rev. 61, 63 (1931); 31 Col. L. Rev. 830).

wherein the Court applied similar rules to comparable contracts, and

Republic Pictures v. Rogers, 213 F. (2d) 662 (C.C.A. 9) (certiorari and rehearing denied, 348 U.S. 858 and 890).

As to the second element of the renewal provision, notice of the offeree's "desire", "election", etc., as a means of acceptance is so common that further authorities should not be required.

The renewal provision was designed to accomplish its obvious purpose of providing for a new term of the contract upon the same terms upon plaintiff's notice to that effect. It must be so interpreted.

To again note Chief Justice Holmes—

“Business contracts must be construed with business sense.”

The Kronprinzessin Cecilie, 244 U.S. 12, 60 L.ed. 960,

and from the *Park & Tilford* case (123 F.S. 484, 489)—

“* * * contracts are often formed between business men of long experience in the trade and familiar with the relationship which they are undertaking, without explicit discussions of the details of the promised performance.”

- b. **It Is Axiomatic, and Statutorially Declared, That a Contract Comes Into Being Upon the Communication of the Acceptance of an Offer—Whether Revocable, Continuing or Irrevocable.**

As to the second element of the option, there is probably no more universal method of accepting offers, revocable and irrevocable, than that of giving notice, notify, etc., etc.

Here the contract so provided in the simplest language, i.e., the “distributor shall so notify Calvert”, as was done in this case, by writing (Plaintiff's Exhibit 3). The only limitation upon the acceptance of the offer is that it be accepted by such notification “not less than 30 days before December 31st, 1952”, which was conformed to by giving such notification on November 18, 1952.

Both the provision for acceptance and the communication of the acceptance fully conforms to the state statute expressly providing for these steps in the creation of a contract.

See Sections 1581-1586 of the Civil Code, in part:

“If a proposal prescribes any conditions concerning the communication of its acceptance, the proposer is not bound unless they are conformed to; *but in other cases any reasonable and usual mode may be adopted.*”

(Section 1582.)

“*Consent is deemed to be fully communicated between the parties as soon as the party accepting a proposal has put his acceptance in the course of transmission to the proposer, in conformity to the last section.*”

(Section 1583.)

“A proposal may be revoked at any time before its acceptance is communicated to the proposer, *but not afterwards.*”

(Section 1586.)

The cases cited to the immediately preceding point of argument are adequate and controlling precedent for—both the provision of the offer, and the method of acceptance in this case.

It is, therefore, respectfully submitted that the literal wording of the renewal clauses of the instant contract both, alone, and as fortified by every aid to in-

terpretation permitted by statute and judicial precedent, can not be construed to support the instant judgment and that the judgment must be reversed, with directions to enter judgment for such damages as plaintiff may establish as having been occasioned by the repudiation of the contract created by plaintiff's timely acceptance of the offer to renew the contract, upon plaintiff's election and timely notification to Calvert as provided in the contract and conclusively established by this record.

**B. THE MATERIAL FINDINGS ARE CONTRARY
TO THE EVIDENCE.**

Finding IV is to the effect that the allegations of paragraph IX of the complaint, first cause of action, are untrue; whereas, the testimony of witness Lewis is clear and uncontradicted that Calvert ceased its efforts to promote the sale of its products in support of plaintiff's efforts to distribute them under the contract and, also, did promote sales in a discriminatory manner in favor of plaintiff's competitor, Julliard. Such "finding" cannot be made to jibe with any version of this record.

Finding V is to the effect that defendant's first "special" defense to this cause of action is true. Such "special" defense is that the undertaking to promote the sale of Calvert products is unlawful. There is no factual support for any such "allegation" or finding and the statute, the evidence and the industry custom are plainly to the contrary.

As this subject is fully detailed in part A-1, of argument, it is unnecessary to repeat the references to the record and to controlling authority therein noted—which demonstrate that the purported findings last noted cannot be sustained upon the record in this cause.

Finding VIII is to the effect that “that it is untrue that Calvert did not have a lawful reason for not shipping” the 900 cases referred to in the order declared upon in the second cause of action and detailed in part A-2, of argument. The “finding” is patently a negative pregnant and conclusionary, but is, specifically, without factual support as set forth in the portion of the foregoing argument last cited. As the evidentiary deficiencies in defendant’s presentation on this point are there noted they are omitted here, in avoidance of repetition.

Finding XI is to the effect that the renewal provision did not constitute a continuing offer to renew the contract upon plaintiff’s election to renew and giving of notice to that effect in accordance with the terms of the contract. Since defendant did not offer any evidence, and objected to the receipt of any evidence proffered by plaintiff upon the meaning and interpretation of the renewal clause of the contract, it is patent there is no factual issue to be resolved on this score and the purported finding can be nothing but an erroneous conclusion of law. The error in construing the contract as other than a continuing or irrevocable offer to plaintiff to renew the contract, as

provided in paragraphs 11 and 12 thereof, is fully detailed in part A-3, of argument and need not be restated here.

Finding XII is that plaintiff has not been damaged—in the face of the express and approved stipulation that the evidence of plaintiff's damage be reserved until the resolution of the issues as to defendant's liability had been determined.

For these reasons the findings are outside the issues and but constitute conclusions of law contrary to the evidence.

C. THE CONCLUSIONS OF LAW AND THE JUDGMENT ARE ERRONEOUS AND DO NOT RESPOND TO THE ISSUES OR TO THE EVIDENCE.

The first conclusion of law, that the contract "was not breached by Calvert," is contrary to defendant's formal admissions and the uncontradicted evidence; and having no evidence to which to respond, the judgment and conclusion are unsupported and erroneous.

The second conclusion of law, to the effect that the contract terminated on December 31, 1952, is contrary to the terms of the contract, in that first the contract, itself, provided for a thirty day period of operation after that date for the resale of Calvert products by plaintiff, in accordance with the contract, in all events, and for the return of the remaining inventory, in the event the contract were not renewed; secondly, the contract provided for its renewal for a succeeding period and it was renewed in accordance with its terms.

The third conclusion of law is that the contract did not provide an option to renew, contrary to any lawful or possible interpretation of the precise terms of the contract.

The fourth conclusion of law is that “the contract pleaded in plaintiff’s complaint * * * was and is illegal, null and void,” whereas, first, the contract declared upon is the precise written contract incorporated by reference and appended to the complaint as an exhibit, and none other; and, secondly, the contract set forth and “relied upon” is lawful in all the respects defendant has attempted to assert—but failed to support by any means or by any principle of law.

The fifth, and final, conclusion of law, and the judgment, is that plaintiff take nothing herein—notwithstanding the admissions of defendant’s answer and the uncontradicted testimony and conceded documentary evidence adduced in support of the allegations of plaintiff’s complaint.

Since plaintiff has set forth evidence and admissions and the principles of statutory and decisional law of the state in adequate detail in support of the foregoing portions of the argument, it is respectfully submitted that the labors of the Court need not be duplicated by a repetition of categorical demonstration of error in each of these conclusions. In this connection may we again call to the attention of the Court that plaintiff sought to avoid these misprisions, by submitting detailed objections to the proposed findings, conclusions and judgment (T 35-38), in the attempt to secure the resolution of the cause in a

manner responsive to the issues and the proof and to provide suitable record for review.

D. PLAINTIFF WAS DEPRIVED OF A FAIR TRIAL.

It is evident that the cause was actually resolved by the adoption of defendant's erroneous and insupportable theory that the entire contract was unlawful for some reason that remains obscure. The anomaly of the party to a contract asserting that an instrument it prepared and specifically relied upon, in defense of the claims incorporated in the complaints and, actually, relied upon by the Court below in adopting five of the twelve findings—was criminal is unprecedented, and was not supported in argument by a single citation of authority, nor documented by any evidentiary showing whatever.

It strains credulity that the instant contract is unlawful "on the face" and there was no evidence produced whence a finding of illegality, *de hors* the instrument, might emanate, hence the Court below should have followed the ruling of the District Court (95 F. Supp. 552) affirmed by this Court (200 Fed. (2d) 561) and by the Supreme Court in

Partmar Corp. v. Paramount Theatres Corp.,
supra, (347 U. S. 532, 98 L. ed. 89, 74 S. Ct.
414)

holding that, where the agreement is not invalid on its face, no party may recover on the theory that the contract is invalid for reasons not appearing therein—in the absence of some evidentiary showing that some "illegality" exists.

It is further submitted that the Court should join with the California Court in the recent case of

Doke v. Brockhurst, 150 A.C.A. 608, 611,

P. (2d),,

in affirming a plaintiff's recovery on breach of contract and resolving the same question of substantive law, as follows:

“* * * Dawe cannot defend on the ground that the contract is unenforceable because of the statute of frauds and at the same time seek to enforce one of the terms of the contract against Doke for Dawe's benefit. If the contract is unenforceable against Dawe it must be equally unenforceable against Doke.”

Herein, however, appears the abberational holding that a contract may be advanced in defense by one who claims it is unlawful to defeat an action to enforce the same contract.

PART FIVE.

CONCLUSION AND SUBMISSION.

It is respectfully submitted that the instant action was not tried upon the issues, and admissions and the evidence in the cause—but resolved upon defendant's untenable assertion that the entire contractual instrument was unlawful on its face, no evidence *de hors* the instrument having been offered in support of such claim; that, in consequence, the findings, conclusions of law, and judgment do not relate to the issues, or to the factual showing presented below; that such pre-

tended illegality of the contractual instrument is contrary to the specific substantive statutory provisions controlling the subject matter, both as enacted by the state legislative body and as interpreted by the state's licensing agency and Courts of this district and circuit; that plaintiff established each of the contested issues, not admitted by defendant, by adequate evidence and no counter-showing was attempted; and that, for each of these reasons, the judgment is unsupported and erroneous with respect to each of the three causes of action set forth in plaintiff's complaint, and should be reversed.

Dated, San Francisco, California,
June 10, 1957.

J. ALBERT HUTCHINSON,
LEON A. BLUM,
By J. ALBERT HUTCHINSON,
Attorneys for Appellant.

(Appendix I Follows.)

Appendix.

Appendix I

Agreement
Calvert Distillers Corporation
and
Key Distributing Co.
Division of
J. C. Milet Co., San Francisco
960 Arlington Avenue
Oakland 8, California

Dated March 14th, 1952.

This agreement made this 14th day of March, 1952, by and between Calvert Distillers Corporation of 405 Lexington Avenue, City and State of New York, hereinafter called "Calvert" and Key Distributing Co., Division of J. C. Milet Co., San Francisco, 960 Arlington Avenue, Oakland 8, California, hereinafter called "Distributor"—

Witnesseth:

Whereas, Calvert has the sole and exclusive right to distribute within the United States, the alcoholic beverages produced by The Calvert Distilling Co., and Carstairs Bros. Distilling Co., Inc., and from time to time may have the exclusive right to sell other alcoholic beverages, and

Whereas, Distributor warrants that it is a licensed distributor of alcoholic beverages in the State of California, holding the necessary Federal, State and local permits authorizing Distributor to distribute alcoholic

beverages in California, and that there are no actions pending or contemplated within the knowledge of Distributor that would in any way jeopardize any of said licenses, and

Whereas, Distributor desires to act as a distributor of alcoholic beverages produced by The Calvert Distilling Co., and Carstairs Bros. Distilling Co., Inc., in the State of California,

Now, therefore, in consideration of the mutual covenants herein contained, the parties hereto agree as follows:

1. Calvert hereby appoints Distributor as a distributor of such of the alcoholic beverages produced by The Calvert Distilling Co., and Carstairs Bros. Distilling Co., Inc., as are listed on Exhibit A attached hereto within the following territory in the State of California:

Alameda and Contra Costa Counties.

2. Distributor hereby accepts the appointment as such distributor and agrees to sell and distribute to retail licensees such alcoholic beverages within the designated territory. Distributor warrants that during the year ending December 31st, 1951, the proportion of its total sales of alcoholic beverages represented by Calvert products was 23 (%) per cent. Distributor agrees that during the term of this contract, it will spend no less than 23 (%) per cent of its time and effort on the sale of Calvert products and not less than 23 (%) per cent of the money spent by it on

advertising and sales promotion shall be expended on Calvert products.

3. It is understood and agreed that the prices at which Calvert shall sell its products to Distributor and the prices at which Distributor shall buy Calvert products from Calvert shall be the prices currently in effect at the time of shipment. Calvert reserves the right to change its prices in its sole discretion from time to time on 15 days' written notice. (Any change necessitated by a change in taxes, whether Federal, State or local, shall be made as required by the tax legislation, without regard to the foregoing notice provision.) Calvert also reserves the right to determine the point of origin and method of shipment, although it shall endeavor to cooperate with Distributor to determine a mutually satisfactory method of shipment. When, as and if Calvert should reduce its prices (except for tax changes) during the term of this agreement, Calvert will give a floor stock adjustment to Distributor on its inventory, provided such adjustment is legal under all prevailing laws and regulations.

4. The amount of credit, if any, extended to and the terms of payment by Distributor to Calvert for the products sold to Distributor by Calvert shall be determined by Calvert from time to time in its sole discretion. It is agreed that the terms stipulated by Calvert on each invoice covering products sold to Distributor by Calvert shall represent the terms of payment with respect to each individual shipment and shall be of the essence of this contract.

5. Calvert agrees to supply its products to Distributor to the best of Calvert's ability, but it is understood and agreed that all or some products may not always be available to fill all orders and Calvert shall have the right to allocate to Distributor such proportion of the available supplies of its products as Calvert shall decide in its sole discretion. Calvert reserves the right not to ship any orders received where such orders would result in an inventory in the hands of Distributor greater than a 45-day inventory, based on the rate of sales of Calvert products by Distributor for the six months prior to the date of this contract.

6. Calvert agrees to promote the sales of its products and to advertise its products in a manner consistent with the type of merchandise and the cases sold. Calvert shall have the sole right to determine the amount of sales promotion and advertising and the media used for advertising.

7. Distributor agrees that it will maintain an adequate sales force properly to represent and to promote the sales of Calvert's products in its designated territory. Distributor agrees to keep this sales force properly informed as to all Calvert's policies and to train them to sell merchandise in a manner which shall be a credit to Distributor and to Calvert. Distributor warrants that it will do nothing at any time to jeopardize its own standing or reputation or license as a wholesaler and will at all times obey all laws, rules and regulations pertaining to the distribution of alcoholic beverages.

8. Distributor agrees that it will maintain an inventory of Calvert products at all times equal to Distributor's average sales for 45 days.

9. Distributor represents that at the time of the execution of this agreement, it is acting as a distributor of the brands of alcoholic beverages listed on Exhibit B attached hereto.

Distributor agrees that it will not undertake the distribution of any additional brands of alcoholic beverages without giving Calvert 90 days' written notice of its intention so to do.

10. At the date of the execution of this agreement, the prices to be charged to Distributor by Calvert for Calvert products are those shown on Exhibit A attached hereto. The resale prices to be charged by Distributor in connection with the sale of Calvert products to retailers are those shown on Exhibit A attached hereto, and in accordance with the Fair Trade Act of the State of California, Distributor agrees that it will not sell Calvert products to retailers at prices less than those shown on Exhibit A. Calvert, however, reserves the right to change the resale prices on sales by Distributor to retailers from time to time.

11. This contract shall be effective for a period of ten months from March 1, 1952. If Distributor desires to renew the contract, he shall so notify Calvert not less than 30 days before December 31st, 1952.

12. In the event that this contract is not renewed, Distributor agrees that within 30 days after December

31st, 1952, it will return to Calvert at its invoice price all of the Calvert merchandise remaining in its inventory.

13. A failure on the part of either party to insist on full compliance with any particular provision of this agreement shall not be construed as a waiver of the party's rights under that provision, and shall not affect any other provision of the agreement.

14. In the event that there is any change in the ownership of Distributor—if a partnership by any change in partners, if a corporation by any change in stock ownership, or if individually owned by any change in said ownership, or if there shall be any change whatever in the management of Distributor, which Calvert shall consider adverse to its interests, Calvert shall have the right within 30 days after notice of the change to cancel this agreement.

15. This agreement shall be interpreted under the laws of the State of California.

16. This agreement represents the entire agreement between the parties and cannot be modified except in writing duly executed by both parties.

Calvert Distillers Corporation

By Walter F. Terry

Vice-President

Key Distributing Co., Division of

J. C. Millett Co., San Francisco

By J. C. Millett

(Exhibits A and B omitted.)

No. 15483

IN THE

United States

Court of Appeals

FOR THE NINTH CIRCUIT

WILSON H. WALTERS,
CHARLES P. CAIN, and
KEITH TERRY,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

*Appeal from a Judgment of the United States
District Court for the Eastern District
of Washington, Northern Division*

BRIEF FOR APPELLEE

WILLIAM B. BANTZ,
United States Attorney.

RINER E. DEGLOW,
Assistant United States Attorney.

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BRIEF FOR APPELLEE

STATEMENT OF JURISDICTION

Appellants, jointly with James O. Jensen, were indicted for violating the fraud provisions of the Securities Act of 1933 [Section 17 (a) (1); 15 U.S.C.

77q (a) (1)], the Mail Fraud Statute (18 U.S.C. 1341), and for conspiring to violate these statutes (18 U.S.C. 371). The indictment contained eleven counts, Counts I through V each charging a specified use of the mails for the purpose of executing a scheme to defraud in violation of the Mail Fraud Statute; Counts VI through X each charging a specified use of the mails in the employment of a scheme to defraud in the sale of securities in violation of Section 17 (a) (1) of the Securities Act of 1933; and Count XI charging the conspiracy and setting forth fourteen overt acts allegedly committed by the defendants in pursuance of said conspiracy and to effect its objective.

All the defendants first pleaded not guilty. After commencement of the trial and several witnesses had testified the defendant Jensen entered a plea of guilty to Counts III and IV (mail fraud) and XI (conspiracy) (R. 282).^① Jensen subsequently testified as a witness on behalf of the Government. At the conclusion of the trial the remaining counts were dismissed against Jensen.

The jury found appellant Walters guilty on all counts, and he was sentenced to imprisonment for a term of one year and six months on each count, the

^①The letter "R" refers to the transcript of testimony filed with the Court for Appeals for the Ninth Circuit.

sentences to run concurrently. Appellant Cain was found guilty on Counts I, III, and IV (mail fraud) and Count VI (fraud in the sale of securities) and Count XI (conspiracy), and found not guilty on the remaining counts. He was sentenced to imprisonment for a period of eight months on Count I (mail fraud). Imposition of sentence on the remaining counts was suspended, and a four-year probationary period imposed. Appellant Terry was found guilty on all counts except Count I. Imposition of sentence on the remaining counts was suspended and a four-year probationary period imposed.

This Court has jurisdiction of the instant case under the provisions of Title 28, Section 1291, U.S.C.A.

COUNTER-STATEMENT OF THE CASE

The indictment in this case charged, the defendants in substance, with devising a scheme to defraud investors in surplus certificates of Washington Insurance Company (Mutual), a Washington corporation, and investors in stock and preorganization subscriptions for stock of an unnamed insurance company to be organized which would specialize in fire insurance on motels. The scheme is set forth in Count I of the indictment, and the allegations in respect thereto are incorporated by reference in the remaining substantive counts. The indictment charged that as part of the scheme to defraud the defendants made and caused to be made certain false representations, pretenses, and promises, and in addition, as part of the scheme to mislead the investors and to persuade and induce them to part with their money for the securities, concealed from the investors material facts.

The specific misrepresentations, which numbered twelve, set forth in Count I of the indictment, are as follows:

- (1) That defendants had obtained permission from the Insurance Commissioner of the State of Washington to solicit and receive funds to provide necessary capital reserves for a proposed fire insurance company to be organized which would specialize in insurance on motels.

(2) That the Insurance Commissioner of the State of Washington had authorized Washington Insurance Company (Mutual) to raise funds to establish a stock insurance company specializing in fire insurance on motels, through the sale to investors of its surplus certificates, which would bear interest at the rate of six per cent per annum.

(3) That all funds received from the sale of surplus certificates would be deposited in a place of safekeeping until released by order of the State Insurance Commissioner for use as capital of a stock insurance company to be organized, which would specialize in fire insurance on motels.

(4) That said defendants had been assured by the Insurance Commissioner of the State of Washington that he would authorize said proposed motel insurance company to write fire insurance on motels at a rate twenty-five per cent less than that charged by other fire insurance companies.

(5) That Washington Insurance Company (Mutual) would guarantee, and was financially able to pay, six per cent interest on surplus certificates issued to investors.

(6) That at any time within one year from the date of purchase of surplus certificates investors could convert their surplus certificates into stock of

the new motel insurance company having double the value of said surplus certificates.

(7) That investors in surplus certificates of Washington Insurance Company (Mutual) could obtain refunds of their investments at any time prior to the conversion of their surplus certificates into stock.

(8) That money invested in surplus certificates of Washington Insurance Company (Mutual) was safe and secure, since all funds so invested were subject to the control and supervision of the Insurance Commissioner of the State of Washington.

(9) That the owners of a large motel enterprise in Salt Lake City, commonly known as "Little America," had offered to provide all of the capital required for the proposed insurance company.

(10) That defendants had made substantial investments of their own funds in said proposed motel insurance company.

(11) That said defendants had given up highly lucrative positions in other businesses in order to become associated with said new motel insurance company.

(12) That the proposed motel insurance company had already commenced operation and acquired valu-

able insurance agencies and made valuable real estate investments.

The third paragraph of Count I of the indictment sets forth that defendants fraudulently omitted to state to investors material facts as follows:

(1) That Washington Insurance Company (Mutual) already had outstanding surplus certificates having a face value of over \$75,000.

(2) That surplus certificates of Washington Insurance Company (Mutual) being sold and offered for sale to said investors included certificates having a face value of \$30,000, but little actual value, which surplus certificates had previously been issued to and were then held by Washington Underwriters, Inc., an insurance agency of which defendant James O. Jensen was President.

(3) That the proceeds of the sale of the \$30,000 of the aforesaid surplus certificates held by Washington Underwriters, Inc. would not be remitted to Washington Insurance Company (Mutual) but would be expended by Washington Underwriters, Inc. and by said defendants for their own benefit, including salaries and Christmas bonuses.

(4) That Washington Insurance Company (Mutual) was operating at a loss and did not then or at

any time in the past have a net earned surplus from which interest on its surplus certificates could be paid.

(5) That said defendants had not obtained or applied for a permit as required by the Insurance Code of the State of Washington to authorize them to solicit or receive funds to organize or finance an insurance company.

(6) That said defendants had agreed among themselves to use said funds obtained from investors in surplus certificates, to organize an insurance agency and not an insurance company.

Although the chief claim of all appellants is that the false representations which they allegedly made to investors were made in 'good faith' (Apps. Walters and Cain brief, p. 21; Terry brief, p. 10), in our opinion their statements of facts do not adequately set forth the evidence in the record, which plainly shows their fraudulent intent.^① Since the argument which immediately follows discusses this evidence fully, it will not be repeated at this point.

^①Appellants apparently do not contest the Government's proofs that the defendants engaged in the sale of securities and that the mails were used to execute the scheme to defraud if such a scheme existed.

ARGUMENT

I

THE EVIDENCE CLEARLY ESTABLISHES THE SCHEME TO DEFRAUD CHARGED IN THE INDICTMENT AND THE WILLFUL PARTICIPATION OF APPELLANTS THEREIN. (APPELLANTS' POINTS I AND II).

The principal issue on this appeal is whether there was substantial evidence from which the jury could find that the appellants knowingly participated in the scheme to defraud. To reach their conclusion that appellants acted in "good faith" appellants urge that most of the testimony of the investor witnesses should be dismissed as having arisen from the investors' own "confusion"; that the inculpatory testimony of Jensen be disregarded as less reliable than that of Cain and Terry (Walters did not testify); that certain admitted misrepresentations should be disregarded because the investors did not rely upon them in purchasing their securities and that the diversion of investors' funds to the appellant's own use was too small to be regarded as motivation for such serious crimes as charged.

This Court has frequently held that in reviewing the record at this time it must take the view of the evidence which is most favorable to the Government and accept as true all the facts which the evidence reasonably tended to show. As stated by this Court

in *Suetter v. United States*, 140 F. 2d 103, 107 (CCA 9, 1944):

“A question of law is thus presented, which calls for an examination of the record, not for the purpose of weighing conflicting testimony, but only to determine whether there was some evidence, competent and substantial, before the jury, fairly tending to sustain the verdict. *Abrams v. United States*, 250 U. S. 616, 619; 40 S. Ct., 17, 18, 63 L. Ed. 1173. The evidence must be considered in the light most favorable to appellee. *Holmes v. United States*, 8 Cir., 134 F. 2d 125, 130; *Hemphill v. United States*, 9 Cir., 120 F. 2d 115, 117.”

See: *Remmer v. United States*, 205 F. 2d 277, 287, 288 (CCA 9, 1953); *Schino v. United States*, 209 F. 2d 67, 72 (CCA 9, 1954).

In a case such as this the defense of “good faith” is but another way of stating that there was no intent to defraud, and as stated by the court in *Remmer v. United States*, 205 F. 2d, 277, 288, which related to fraud in an income tax evasion case:

“A state of mind can seldom be proved by direct evidence but must be inferred from all the circumstances.”

In *Hawley v. United States*, 133 F. 2d 966, 970 (CCA 10, 1943), the court said:

“But the question of good faith, honest belief, intentions and purposes, are, under these facts, questions which are properly within the province of the jury to decide under competent instructions from the court concerning the legal standards by which guilt or innocence must be judged.”

In *Stone v. United States*, 113 F. 2d 70, 74, 75 (CCA 6, 1940), the court said in reference to the defense of good faith and intent as resolving itself into one of fact:

“We arrive at one’s intention by taking hold of certain circumstances, extraneous though they may be, and reasoning out the purpose in doing the act. It is a mental process, but a man’s intention is really a question of fact to be arrived at by the trier of the facts in the exercise of reasonable discretion, after considering all the circumstances connected with the act charged. Whatever result reasonably flows from an act is presumed to have been intended by the person who did it.

* * *

“Where guilty knowledge is an element in the offense, as in conspiracy charges and the use of the mails to defraud, the knowledge must be found from the evidence beyond a reasonable doubt, but actual knowledge is not required; it may be inferred. *Scienter* may be inferred where the lack of knowledge consists of ignorance of facts which any ordinary person under similar circumstances should have known. Ignorance of inculpatory facts is no more a defense than ignorance of inculpatory law.”

Before considering the specific evidence which refutes appellants' contentions, it should be emphasized, as the record clearly establishes, that appellants were experienced in the insurance business (Exs. 83, 85; R. 924, 925, 928-31), were advised regarding the requirements of the insurance laws of Washington (R. 447-8), and their victims were for the most part uninformed laymen, chiefly farmers, who, however gullible, are entitled to as full protection against securities fraud as are sophisticated investors. *U. S. v. Monjar*, 47 F. Supp. 421, 425 (D.C. Del. 1942), affirmed 147 F. (2d) 916 (C.A. 3, 1944), cert. den. 325 U. S. 859.

We will show that the testimony of the witnesses was remarkably clear in describing a uniform pattern of misrepresentation; that any confusion in the evidence is that consciously injected by appellants in attempting to invent some explanation for their fraudulent statements; and that there is substantial evidence, although directly conflicting with that of appellants, that each of the appellants knew that the false statements made to prospective investors, as alleged in the indictment, were false.

As to appellants' contention that the amounts they received from the investors' funds were too insignificant to be considered a motive for these serious

crimes, which we do not concede^①, such circumstances would not exculpate them. This indictment did not charge appellants with larceny or embezzlement, but with participating in a scheme to defraud by misrepresentation. As stated by the court in *U. S. v. New South Farm*, 241 U. S. 64, 71.

“When the pretenses or representations or promises which execute the deception and fraud are false, they become the scheme and artifice which the statute denounces.”

It has become well settled that it is not a good defense in a case of this sort that the defendants had confidence in the ultimate success of an enterprise and so expected ultimately to save the investors from loss or even make profits for them. If they intended to obtain the money by means of false representations or promises there would be a violation of the laws by the ones so intending. *Deaver v. United States*, 155 F. 2d 740, 744; *Pandolfo v. United States*, 286 F. 8, 13; *Moore v. United States*, 2 F. 2d 839, 841; *Foshay v. United States*, 68 F. 2d 205; *Linn v. United States*, 234 F. 543.

We will show that in this case the evidence is abundant that all appellants embarked on a scheme

^①Appellants fared well in their brief venture. Walters received \$10,031.09, Cain \$5,348.76, Terry \$5,382.63 for less than seven months of very intermittent service. Jensen received \$12,248.05. (R. 779)

to lure investors by false assurances that their investments were subject to the statutory protective safeguards of the insurance laws of the State of Washington against fly-by-night insurance company promotions, knowing at the time that they were deliberately evading the requirements of those laws. We will show that they concealed and misrepresented to the investors facts known to them regarding the soundness of the investment and regarding their own private arrangements for setting up their new venture with the investors' funds.

A. *The Walters Plan for Motel Insurance at a Deviated rate*

The instant venture was predicated upon a plan conceived by Walters in 1954 (1) to take over an existing "broken down insurance company" (R. 448, 1017, 1018) and (2) use it as a vehicle to raise money (a) to finance a new insurance *agency* specializing in selling insurance to motels at a reduced or deviated rate and (b) to provide surplus for the insurance company.

In July or August 1954, Walters found the broken down insurance company he was seeking in Washington Insurance Company (Mutual), which had had an uncertain existence since 1948. He enlisted Cain (R. 1015), and they discussed the motel insurance idea with Jensen, the president of the company. The pos-

sibility of forming a new insurance company was discussed by Jensen, Walters, and Cain, but in view of the statutory requirements of a permit, bond, and escrow under the state law, it was decided it could not be done (R. 447-8). Walters assured Jensen that he would raise sufficient finances to put Washington Insurance Company (Mutual) "in good shape" (R. 433-6). Jensen acquiesced in the Walters plan, which was set down in a formal agreement signed by Walters, Jensen, and Cain September 30, 1954 (Ex. 46).^①

Under the terms of the complicated agreement, which was never shown to any of the investor-witnesses who testified in the case, there would be sold to the public (1) \$25,000 of surplus certificates of Washington Insurance Company (Mutual)^② which had been authorized in September 1953 to permit this company to obtain additional reserve capital (Ex. 29), and (2) \$30,000 of outstanding surplus certificates previously issued by Washington Insurance Company to its agency company, Washington Under-

^①A fourth party to the agreement, Robert Harris, did not join in the promotional efforts and soon was dropped from the venture. There was discussion that he would be replaced by Terry (R. 460, 464, 466, 1287-94) in sharing in the promotional stock to be issued in the new agency company.

^②Surplus certificates are instruments evidencing borrowed capital and, by their terms, are payable only out of net earned surplus (Ex. 3A).

writers, Inc. The funds to be obtained by the sale of the surplus certificates would be distributed as follows: \$10,000 for expenses of setting up the project; \$20,000 to Washington Insurance Company (Mutual); and \$25,000 to the agency company.

B. *Terry Joins Promotional Group*

Walters and Cain talked to Terry, who was then engaged in selling mattresses to motels (R. 1031), in Spokane, Washington, in August 1954 (R. 1144). They described their plan for selling insurance to motels at a deviated rate and for rejuvenating Washington Insurance Company (Mutual). Terry desired to have a share in the management of the new agency company and also wanted to see how the public would react to the Walters-Cain sales talk. He accompanied them on two trips, supplying them with former insurance customers of his, to test the sales pitch. Walters gave the presentation to one prospect (R. 1052) and Cain to another (R. 1063). Terry was then brought to Seattle in October 1954, where he met Jensen (R. 456-7, 1164). Jensen showed him the company's financial report (R. 544-5), told him the company's history and condition (R. 463, 468-9), and all discussed the agreement of September 30, 1954, and the possibility of Terry's getting promotional stock in the new agency company (R. 457).^① Jensen

^①Both Terry and Cain testified that Terry saw the agreement at least at a later date (R. 1069, 1287-1290).

also explained to Terry, as well as Cain, that the idea of the deviated rate was impossible (R. 468) because of the company's lack of insurance experience. He had previously given a similar explanation to Walters (R. 436). Jensen explained to all appellants that the only way reduced insurance rates to motels could be arranged would be to write the insurance on the mutual plan, and if the loss experience was favorable grant them a larger dividend. Terry accepted this idea, saying, "Well, I can sell it that way. I can sell it that way." (R. 586)

C. Sales of Surplus Certificates in Excess of Authorization

At the outset of the sales campaign Walters prepared a sales kit containing factual information reflecting the earning records and appreciation of stock values of several well known insurance companies, particularly those engaged in writing insurance for limited groups such as hardware men, druggists, and lumbermen (R. 465). Armed with this kit, Cain and Terry made most of the sales, which proceeded with great success. Interest was paid on some certificates already sold, but was paid out of the proceeds of the sale of surplus certificates and not out of income (R. 591-2, 210). Some investors were "re-loaded," with assurances that only a small additional amount was needed to meet the full quota of capital

required. Cain persuaded Frank Miller, a farmer with four infant children, to borrow on his life insurance policy, as this was his last chance to get in on the ground floor (R. 264; Ex. 42). Terry told the Schneidmiller brothers that with their \$500 additional investment they would be able to start the company (R. 904). Cain and Terry obtained \$4500 from Evansons on their second call, assuring them that was all they needed and then they were ready to start the company (R. 840).

By December 15, or earlier, the entire \$55,000 of surplus certificates had been sold (R. 1041, 474).^①

The question of exceeding the \$55,000 limit and selling unauthorized surplus certificates was then discussed, and the group decided to go along with the continued sale (R. 476). At about this time Walters was clamoring for a Christmas bonus to be paid to himself, Terry, and Cain (R. 475).^② Although Cain

^①The company records showed the following cash receipts from investors on the respective dates: (R. 781-)

Total sold August 1 to December 15, 1954	\$ 56,000
Total sold to December 31, 1954	72,000
Total sold to January 31, 1955	89,000
Total sold to March 2, 1955	104,700

^②Checks dated December 23 in the amount of \$500 each were issued to Cain, Walters, and Terry. Jensen states he was reluctant to pay the bonuses because the expenses were getting high (R. 475).

was apparently not present at this pre-Christmas meeting, he knew that the limit had been reached (R. 1041), and made sales thereafter to Garrett (R. 762) and Prichard (R. 863) and continued to draw his pay.^①

At a meeting in January, Jensen, Walters, and Terry had a further discussion about the continuing sale of unauthorized surplus certificates. Terry suggested that they could pick up the surplus certificates and give the investors receipts to be held until the stock was issued. The idea of giving the money back to investors was definitely rejected (R. 478-480).

On February 1, 1955, Hollenback, an insurance examiner from the Washington Insurance Department, called at the office of Washington Insurance Company (Mutual) and made a cursory examination, as a result of which he found evidence of the sale of the unauthorized surplus certificates. He immediately reported this to Chief Insurance Examiner Bradley, who orally ordered Jensen to cease the sale of surplus certificates immediately (R. 803). Bradley followed this up with a letter dated February 3 (Ex. 17;

^①Soon thereafter Cain left the organization for a time and went to Denver. There was considerable dissension among the group over suspicion that Cain had gone to work on another job (R. 505, 508). Cain continued to look for his pay (R. 507) and drew his checks until January 19, 1954 (R. 833).

R. 484). Jensen communicated Bradley's orders to Cain, Walters, and Terry (R. 485, 588).

D. *Attempts to Conceal Over-Sale*

No sales of surplus certificates appear to have been made following the Bradley letter, although thereafter Terry turned in approximately \$12,500 previously obtained from investors (R. 549-550). Walters, Terry and Jensen made extensive efforts to conceal their unauthorized sales, following Terry's plan to not deliver surplus certificates to investors and substitute in lieu of the certificates, receipts for stock to be issued (R. 490, 494). Terry and Walters called on investors and went through motions of showing surplus certificates which they stated they had inadvertently neglected to have signed by the president (R. 628, 629, 892) or told the investors that they had left the certificates behind (R. 608, 616, 617). They described to these investors in glowing terms the rapid progress which they had made toward starting the new company (R. 153, 191) and in some cases said that the company was already organized (R. 321), had purchased an insurance agency (R. 153), or was contemplating the purchase of a motel with its reserve funds, so that it would be making money while the insurance features were being ironed out (R. 223, 321-324). Pictures of the new company quarters were shown (R. 153, 322). Those investors who had not received surplus cer-

tificates were urged to sign receipts evidencing their willingness to take stock of "the market value of \$2.00 a share" (in the yet unorganized company) in lieu of surplus certificates (Ex. 96, R. 895; 628-629). Investors who had received surplus certificates were exhorted to turn them in for stock which they were assured would be promptly issued (R. 153, 222, 323, 292). Meanwhile, as the surplus certificates were picked up from investors, Jensen performed a book-keeping deception by showing transfers of surplus certificates on the books from one investor to another, instead of new issue certificates, thus reducing the amount of outstanding surplus certificates shown and intending to conceal the over-sale from the Insurance Department examiners (R. 480-482).^①

During the first ten days of February 1955, Hollenback was in the office of Washington Insurance Company (Mutual) making his examination, and observed appellants Walters and Terry on the premises, Walters being there nearly every day (R. 817). Neither of them made any disclosure to him of what they were doing, of the proposed new company to be formed, or of the sale of surplus certificates and the exchange of these certificates for stock (R. 823).

^①Cain does not appear to have participated in this exchange of surplus certificates for receipts.

During March 1955 "rehabilitation proceedings"^① were commenced by the Washington Insurance Commissioner against Washington Insurance Company (Mutual), but Terry gave no indication to investors of any difficulty. On March 14 he told Jack Schlee, in Spokane, that all was coming along fine (R. 370). About April 28 Hollenback sent out letters to investors to verify their purchases of surplus certificates and indicating the imminence of a receivership. One such letter was received by investor Elmer Schneidmiller, who then called Terry to inquire about the situation. Terry told him he had talked to Hollenback, who made the statement, "The company was in better condition than ever" (R. 652). Hollenback denied making such statement (R. 814, 825). Mary Evanson, an investor, also received such a letter from the Insurance Commissioner (R. 847) and called Terry on the telephone. Terry told her "there was nothing to be worried about, that they were having a little investigation, and that everything was fine and he would be down in a day or two."

Walters continued to receive checks as late as March 19, 1955, and Terry received his last check on April 20 (R. 833). By this later date Terry and Walters had commenced another insurance deal in

^①Soon thereafter Washington Insurance Company (Mutual) was ordered into State receivership (Ex. 8M).

Alaska, and wrote Jensen April 5, 1955, from Alaska, saying in part, "The deal here looks good. . . . Do we get paid on the 15th?" (Ex. 62; R. 512-5).

E. *Fraudulent Misrepresentations and Omissions*

(1) *Relating to the Approval of the Venture by the Washington Insurance Commissioner*

The very core of this scheme to defraud was the composite representation that this was a safe and secure investment because the entire plan was being carried out under the protective supervision of the Insurance Commissioner of the State of Washington.^① In essence, it was represented that this entire plan for which funds were being raised had been submitted to the Washington Insurance Commissioner, who had given his preliminary approval. Final approval awaited only the raising of the necessary capital reserves to qualify for *an insurance company charter*. Meanwhile, the funds would be held in escrow under the control or supervision of the Insurance Commissioner and could not be used for the promoters' expenses (R. 368). Investors would receive 6% interest from Washington Insurance Com-

^①The allegations of fraud in this respect are specified in the second paragraph of Count I of the indictment, numbered 1, 2, 3, 4, and 8, and in paragraph 3 of Count I, material omissions numbered 5 and 6.

pany until the new insurance company was formed. At that time they could exchange their certificates for stock in the new insurance company at the rate of two shares of stock for each \$1.00 of surplus certificates.

Albee, an investor-witness, testified that Walters told him: (R. 399)

“A. They said that they were selling surplus certificates and that the least that we could expect on our money was the 6% interest from them; that they were safe from the standpoint that the Insurance Commissioner of the State of Washington had approved their sale and that the State of Washington had very strong insurance laws and Mr. Sullivan, the Insurance Commissioner, is a very highly respected Insurance Commissioner throughout the country, and that there just was no way to go wrong on the deal.”

Investor-witness Garrett testified concerning the statements of Cain and Terry (R. 762):

“Well, that they were forming a new insurance company, selling these surplus certificates. The Washington Insurance, Mutual was the mother company for these surplus certificates and this new insurance company was to be a company to insure motels exclusively, and they were raising \$100,000 in these surplus certificates . . .”

and at R. 763 Garrett testified:

“Well, they said the Washington Insurance Company (Mutual) was an old established company which had lots of insurance in force, an up and

coming company, and this new company to be formed would be the insurer of motels exclusively, and that they had the permission from Mr. Sullivan, the Insurance Commissioner, to sell the surplus certificates and the money would be put in escrow under Mr. Sullivan's supervision until the total amount was raised . . .

Q. Now after the total amount was raised what would happen then?

A. Well, then we would have a chance to trade our surplus certificates two to one for stock in the new company.

Q. Now was all of the money to be put in escrow under the Insurance Commissioner, did they tell you?

A. Every dollar of it was to be in escrow."

As Terry explained it to investor-witness Mary Evanson (R. 841):

. . . "But we asked them again about the security of the company, and they assured us that you couldn't lose, that is all there was to it, that the least you could get was your 6%."

Of the same tenor was the testimony of Jolly (R. 207) (Terry and Cain), Adams (R. 137) (Terry and Cain), Miller (R. 258) (Terry and Cain), Schierman (R. 601) (Terry), Goodwater (R. 623) (Terry), Schultheis (R. 329) (Terry), Wirth (R. 352) (Terry), Schlee (R. 366) (Terry), and Nichols (R. 890) (Terry). Investors were told that the application for

a deviated rate had been applied for (Adams, R. 148, 186; Schlee, R. 368; Schultheis, R. 331), and preliminary approval had been granted. (Schierman, R. 603).

The representations made by appellants regarding the approval of the Insurance Commissioner for their plan were entirely false. To raise funds for any type of promotion for a new insurance company requires, first, a solicitation permit, and second, that the funds be escrowed.^① So, also any "deviated rate" would require approval of the Insurance Commissioner (R.

^①The Washington Insurance Code sets up definite requirements relating to the promotion of an insurance company (R. 697-702). These were set forth in part in the Court's instructions (R. 1343):

"RCW 48.06.030 Solicitation Permit: No person forming or proposing to form in this state an insurer, or insurance holding corporation, or stock corporation to finance an insurer or insurance production therefor, or corporation to manage an insurer, or corporation to be attorney-in-fact for a reciprocal insurer, or a syndicate for any of such purposes, shall advertise, or solicit or receive any funds, agreement, stock subscription, or membership on account thereof unless he has applied for and has received from the Commissioner a solicitation permit."

"RCW 48.06.120 Escrow of Funds. 1. All funds received pursuant to a solicitation permit shall be deposited and held in escrow in a bank or trust company under an agreement approved by the Commissioner. No part of any such deposit shall be withdrawn, except:"

705).^① No application for a solicitation permit to raise money for a new insurance company was ever filed with the Insurance Commissioner, no application for a deviated rate was ever made, and no disclosure was ever made to the Insurance Department by the promoters of this venture that a motel insurance company with a deviated rate feature was being promoted (R. 701-705, 753-754). Jensen testified that he informed Cain, Walters and Terry that

^①Under the Washington Insurance Code, RCW 48.19.040, et seq., rates are filed for fire insurance companies by an insurance rating bureau, of which they are members. Deviations by a subscriber member require specific application and approval (RCW 48.19.280) based on applicable provisions of rate making as provided in RCW 48.19.030.

such a deviated rate could not be obtained at that time (R. 436, 468, 469).^②

Appellants' claimed, during the trial, that they represented to investors that they intended merely to raise funds to start an insurance *agency*. Quite obviously, if defendants could show that merely an agency was to be formed, their activity would have lost much of its color of illegality, since no application to or approval by the Insurance Commissioner would be required to organize an insurance agency and no escrow of funds would be necessary.

^②Appellant Terry concedes this representation was made and that he was instructed to make it and furnished material about it in his sales kit (Terry Br. 14). Appellants Walters and Cain also concede that the proposed deviated rate was one of the "prime moving causes of the entire transaction," but believed or were *led* to believe it could be obtained (Walters and Cain Brief pp. 14-15). They cited the testimony of Jensen (R. 586). We believe they have misunderstood his testimony. Jensen explained that a deviated rate for motels was impossible at that time, and that the only way motels could receive any advantage would be by the customary procedure of mutual companies in granting an increased dividend if the motel loss experience justified it. Such a procedure, of course, would have little selling appeal for the insurance company, since similar procedures could be employed by any competitor, and it amounted only to a promise of a possible rebate rather than an actual present reduced rate.

Throughout the trial appellants sought to break down the testimony of the investor-witnesses to fit this pattern of their defense, to which they subsequently testified. The witnesses as emphatically denied that they had been told of any plan to start an *agency* and clearly testified that they had been told of a plan to start an insurance *company* (R. 96-96, Ex. 106, 187-188, 302, 342-343, 361-362, 366, 376, 637, 852).

Much of the sales talk of appellants would have been meaningless and inconsistent if, as they testified, they told the investors only of a plan to set up an insurance agency. Thus, it was represented to investors that their money would be used for capital reserves for the new insurance company and that when the required amount was obtained the Insurance Commissioner would authorize their charter (R. 208, 352, 366, 602-603, 763, 907).

Appellants' entire sales talk to investors and the material in their sales kits was built around the success of insurance *companies* insuring specialized groups at reduced rates (Ex. 106, R. 138, 1087-1088) and the safety of an venture authorized and supervised by the State Insurance Commissioner under whose control the funds would be escrowed. There was no sales appeal in selling stock in an insurance agency, and appellants knew it.

Perhaps the most sinister feature of appellants' sales representations was the use of photocopies of the letter from the Insurance Commissioner dated September 3, 1953 (Ex. 29), authorizing Washington Insurance Company (Mutual) to sell \$25,000 of surplus certificates to increase its capital reserves. This letter, carrying the signature of the Commissioner on his letterhead, was almost always placed before the investors to show that their plans were under the supervision of the Insurance Commissioner and was used so artfully that appellants' claims were never questioned (R. 72, 149, 214, 260, 329, 400, 867), due in large part to the fact that they were dealing with many of their former insurance customers, who trusted them (R. 244). The letter was used without disclosing the circumstances of its issuance (R. 697), the fact that it was not issued in connection with this motel insurance plan, that no escrow was required for the funds to be raised thereunder, that its \$25,000 authorized limit had already been exceeded, and that it did not cover surplus certificates previously issued and outstanding and owned by Washington Underwriters which were being sold (R. 217, 299, 1037). The use of this letter was itself sufficient to show the fraudulent intent of all of the appellants.

(2) *Representations and Omissions Regarding the Financial Advantages of Investing in Surplus Certificates of Washington Insurance Company (Mutual)*^①

It was part of the representations made to investors that an investment in surplus certificates would assure a return of 6% per annum on the investment during the period while the money was in escrow and the investor was deciding whether he wished to convert his surplus certificates into shares of the new insurance company being formed. Investors were usually told that they would have one year to decide regarding this conversion, and, if they desired, they could then leave their money invested in the surplus certificates and continue to draw 6% interest, and that they could withdraw or obtain refund of their money at any time prior to conversion of their surplus certificates into stock (R. 62, 332, 366, 767, 842). Washington Insurance Company (Mutual) was usually described as a small, but growing and prospering concern (R. 323, 334, 382, 624, 866, 901). As presented to investors, this feature of 6% interest with the assured safety of the funds under the control of the Insurance Commissioner was one of the chief inducements. Mr. Berry was told by Walters it was "as good as money in the bank at 6%" (R. 389). Cain

①These misrepresentations are contained in the second paragraph of Count I of the indictment, numbered 5 and 7, and in the allegations of omissions in the third paragraph, numbered 1, 2 and 4.

and Terry assured Evansons "you just couldn't lose, that's all there was to it, that the least you could get was your 6%" (R. 841).

No disclosure was made that Washington Insurance Company (Mutual) was and had been operating at a loss or that it had failed to pay interest on its outstanding surplus certificates (R. 837, 148, 149). Despite the fact that the subscription agreement (Ex. 105) signed in connection with the sale of surplus certificates expressly described the issue as being sold by and for Washington Insurance Company (Mutual), no disclosure was made that \$30,000 of the certificates were certificates already outstanding in the hands of Washington Underwriters, Inc., that the proceeds from the sale of these certificates were being used to pay the promoters' salaries and expenses (R. 1070, 1081), and under the terms of their secret agreement (Ex. 46) would never go to Washington Insurance Company (Mutual) (R. 1040-1041, 1295), or to start an insurance company.

As indicated in the Statement of Facts above, there was testimony by Jensen that Cain, Terry and Walters all were shown data relating to the history and true financial condition of Washington Insurance Company (Mutual) (R. 544-545), that they were aware of the expenses of the promotion (R. 583). Of course Cain and Walters were parties to the

secret agreement and Terry knew its contents (Ex. 46). Cain even admitted he had never seen a financial statement, did not know if the company had any earned surplus out of which the interest and principal of the surplus certificates could be paid (R. 1049), and admitted that Jensen's lawyer, Rutherford, told him "the company had never paid a dime of interest" on its surplus certificates (R. 1050-1051).

In view of Jensen's testimony and Cain's admission of the Rutherford statement, certainly appellants were chargeable with knowledge of the shaky financial condition of Washington Insurance Company (Mutual). With such knowledge their representations regarding secure income from investment in surplus certificates of this company were knowingly and willfully falsely made and appellants can make no valid claim that they acted in "good faith".

(3) *Representations Relating to Appellants' Personal Interest in the Venture*①

To a large extent investors were influenced by the fact that Cain and Terry, whom they regarded as insurance men with a considerable knowledge of the business, highly recommended this investment. Both Cain and Terry told investors that they had made great personal sacrifices in leaving much better paying positions to undertake the organization of this new insurance company because it offered them such wonderful opportunities for future earnings in the insurance business. This was graphically demon-

①These misrepresentations are contined in the second paragraph of Count I of the indictment, numbered 10 and 11, and in the omissions numbered 3 and 6 in the third paragraph of Count I.

strated by both Cain and Terry producing evidence of their past earnings and statements that they had left jobs paying \$28,000 to \$30,000 to work on this deal (R. 72, 143, 183, 260, 357, 768, 1019-20). Defendants also represented to investors that they had made substantial financial investments of their own (R. 101, 183, 218, 628, 668, 307). Cain indicated that he had mortgaged everything he had to invest in the company (R. 260). They represented that all of the investors' money would be escrowed and none would be used to pay them, but they would obtain their returns at a later date in the sale of the new motel insurance (R. 368-369, 647-8, 869).

The facts were that defendants admittedly had not given up particularly lucrative jobs. Cain had transferred from another insurance company paying an equivalent salary (R. 1018), and had enjoyed a rather transient experience as an insurance salesman over the years (R. 1013). Terry admitted to an income the preceding year of approximately \$3,400 (R. 1226), and was engaged in the sale of mattresses at the time he entered on employment in this venture. Neither Cain, Walters, or Terry invested a cent in the venture. Apparently in an effort to justify the representation relating to his investment, Terry testified that he had turned in two automobiles on the purchase of an automobile for Cain's use in selling the surplus certificates. The facts were that this auto-

mobile was purchased for Cain, who gave his note to Terry (R. 1005). The automobile never became an asset of Washington Insurance Company (Mutual) (R. 552, 1054-1055).

(4) *Representation Regarding the Offer of Investment by "Little America" Interests*

Investors were told by Cain and Terry that the motel insurance plan would receive such spontaneous reception from motel owners that the new company would be virtually assured of a large percentage of the motel insurance business. This, of course, was keyed to the basic representation, indeed attractive although baseless, that motels would be offered their insurance at a 25% reduced rate. In explaining the enthusiasm of the motel owners for the plan, Cain and Terry told investors that the "Little America" motel interests, a nationally known motel enterprise in Salt Lake City and Wyoming, had offered to advance the entire capital needed to set up the organization (R. 61, 140, 847, 868). It was then pointed out that the offer had been rejected because it was not desired to have control of the company in the hands of one organization. For this reason, investors were told, investments were being limited to \$10,000 (R. 765).

The story of the "Little America" offer appears to have originated with Walters (Terry Br. p. 17;

R. 1094), who told Cain his former employers in Idaho had contacted the Coveys, owners of "Little America" (R. 1094). To prove its falsity, Mr. Stephen G. Covey was called by the Government to testify. He explained that the Little America Motel was owned by his family and some other associates. He recalled having some discussion with an unidentified person about purchasing insurance at lower rates, but denied that there had been any talk about an investment in a corporation which would offer such insurance (R. 250). Covey then was asked (R. 254):

"Q. Is it possible your brother could have had a conversation with someone at some time about insurance?"

"A. I am very doubtful and my brother would be very unapt to even discuss this type of thing to the extent of anything that was of an arranging nature. I don't think he even would be into the subject."

No testimony was introduced by defendants that any person from Little America did make any such arrangement as claimed by defendants.

F. *Summary*

Appellants cite numerous cases (Walters-Cain Br. 21-22) with which we have no quarrel. These cases merely recognize that "good faith" is a defense in a fraud case. Such a defense was fully presented and fully argued by counsel. The jury rejected it.

The appellants also cite *Krulewitch v. U. S.*, 336 U. S. 440 and quote the admonition of Justice Jackson in his minority opinion. Neither the case nor the remarks of Justice Jackson have any application here. This was no case where a conspiracy count was added for procedural advantage. The evidence of participation in the common scheme and conspiracy of all those indicted was overwhelming. Analysis of their misrepresentations shows a striking similarity among the false statement made by the several appellants, and indicates, we submit, a close knit scheme of operation involving full exchange of methods for the more effective gulling of investors. All that can properly be said is that the conspirators had a falling out before the trial of this case. While "thieves fall out", this does not detract from the fact that they continued long enough in their common scheme to perpetrate the fraud charged to them and thereby each became charged with responsibility for the acts and statements of the others.

Coplin v. U.S., 88 F. 2d 652, 660 (CCA 9, 1937), *cert. den.* 301 U. S. 703; *Bogy v. U. S.*, 96 F. 2d 734, 741, 1930, *cert. den.*, 305 U. S. 608; *Lewis v. U. S.*, 38 F. 2d 406, 415 (CAA 9, 1930). See *Baldwin v. U.S.*, 72 F. 2d 810, 814 (CCA 9, 1934).

This trial lasted over two weeks, 33 witnesses testified, the record comprising nearly 1400 pages of transcript and 111 exhibits. The case was presented to an impartial jury under a full and fair set of instructions and the essential elements of conspiracy and fraud and the defenses thereto were carefully outlined by the Judge to the jury. There was ample basis for the jury's conclusion that the defendants were all knowing participants in the fraudulent scheme and conspiracy.

II

THE COURT GAVE AN ADEQUATE INSTRUCTION AS TO THE DEFENSE OF "GOOD FAITH". (TERRY BRIEF, POINT III; WALTERS-CAIN BRIEF, POINT IV).

Appellants have challenged the trial court's instruction as to the defense of "good faith", contending that the instruction given was inadequate, "made no effort to define good faith"; and that the court, "devoted only a single sentence", to this point. (Walters-Cain Br. 27; Terry Br. 23).

It is to be noted initially that the record reveals appellants made no objection to any portion of the

charge concerning "good faith", nor did they object to the omission therefrom of any of their requested instructions concerning "good faith" as required by Rule 30, Federal Rules of Criminal Procedure, 18 U.S.C.A. Although the point may be disposed of on this ground alone,^① it is not necessary to do so, since the trial court's instructions more than adequately defined "good faith".

Appellants, in arguing that the cited portion of the charge relating to good faith was insufficient (Walters Br. 27), have failed to point out other portions of the instructions which taken as a whole clearly state the proper law applicable to the proffered defense. See *Askins v. U. S.*, 231 F. 2d 741 (CCA D.C., 1956), *cert. den.*, 351 U. S. 989 (1956); *Herzog v. U. S.*, 235 F. 2d 664, 667 (CCA 9, 1956).

①In addition, appellants did not comply with Rule 18(2) (d) of this court requiring that appellants' brief shall contain, in the order there stated—

"In all cases, a specification of errors relied upon which shall be numbered and shall set out separately and particularly each error intended to be urged. * * * When the error alleged is to the charge of the court, the specification shall set out the part referred to totidem verbis, whether it be in instructions given or in instructions refused, together with the grounds of the objections urged at the trial."

See *Kobey v. U. S.*, 208 F. 2d 583, 587 (CCA 9, 1953).

In other parts of the charge the court specifically referred to the defense of good faith by stating:

“False representations, pretenses, and promises, within the meaning of the law, mean any representations regarding present or past facts, any opinions expressed by defendants, and any predictions or promises as to the future, *not made in good faith . . .*” (emphasis added) (R. 1344).

and the court, in another portion of the charge, instructed the jury that:

“There can be honest, though mistaken, judgment of the future from existing conditions; even sincere but visionary optimism is allowable . . .” (R. 1345).

Furthermore, the court specifically charged the jury that:

“Ordinarily, fraud cannot be predicated upon promissory statements or promises of what will occur or is likely to occur in the future. A mere promise or prophecy will not support an action for fraud, but promises and representations regarding a future event with fraudulent intent to deceive and without the intention of performing them at the time they are uttered are fraudulent. Opinions and beliefs are not fraudulent.

“If any of the defendants made promises and predictions of future events which were glowing, spectacular, and grandiose, the test is whether

or not he actually believed them at the time they were uttered. If he believed them at the time they were uttered, they were not fraudulent, but if he believed in his own mind that they would not materialize, or if they were made recklessly without knowledge of the facts and with intent to deceive, then the representations were fraudulent." (R. 1341-1342).

In addition, in the instruction relating to the charge of conspiracy, the court stated:

"If the prosecution fails to establish one or more of these elements from the evidence beyond a reasonable doubt, then you should acquit the defendant of the charge of conspiracy as to the particular defendant under consideration.

"To conspire means to participate willfully and purposely in the agreement with specific intent to violate the law or reckless disregard as to whether participants act in violation of law, so that a person intentionally encouraging, advising, or assisting other conspirators for the purpose of furthering their enterprise or scheme, with understanding of its lawful character, becomes a willful participant in the conspiracy.

"The charge of conspiracy involves an evil mind and a wrongful intent. The purpose of the conspiracy statute is to protect against forming an agreement to intentionally defraud others, and if a defendant acted in good faith and had an honest belief in the work in which he was engaged and in any statements which he made, he was not guilty of the crime of conspiracy." (R. 1355).

Moreover the court specifically charged the jurors that they, "should consider the court's instructions

as as a whole and not place special emphasis on any part of them". (R. 1334).

The cases of *Morissette v. U. S.*, ³⁴²324 U. S. 246 (1952) and *Little v. U. S.*, ⁷³78 F. 2d 861 (CCA 10, 1934), relied upon by appellants have little relevance since, unlike the instant case, they discuss situations where the trial court completely failed to charge as to certain essentials. Similarly, in *McAffee v. U. S.*, 105 F. 2d 21, the court held it error where the trial court refused to give certain proper instructions requested by defendant either in terms or in substance. And in *Hawley v. U. S.*, 133 F. 2d 966 (CCA 10, 1943), the appellate court, in approving the trial court's instructions as to good faith in that case affords us no guide as to the appropriateness of the charge given in the instant case.

It cannot be contended that the instructions given by the lower court were inadequate because they did not define the term "good faith." In this connection, it is noted that the instructions accepted by defendants as proper in the *Hawley* case, *supra*; and in *Coleman v. U. S.*, 167 F. 2d 837 (CCA 5, 1948) (Walters Br. 28-29, 30-31) do not attempt to define the term "good faith" but merely employ analogous language used by the court below. It is well established that words in common use clearly understood by the

jurors require no definition.^② The term “good faith” is of that character, being a term of universal usage, having no hidden or technical meaning.

The argument that the instruction should have been longer and more emphatic, taking the form as requested by appellant, Terry, is also without merit. “A court is not required to charge the jury in any particular form of words, and it is not necessary for the charge given to be framed in words suitable to counsel.” *Knight v. U. S.*, 123 F.2d 959, 961 (CCA 5, 1942). All that is required is that the charge fairly state the law applicable to the case, and there is no contention that the instruction in the instant case was erroneous. If this is done, there can be no error if the court refuses to give a requested charge.^③

III

THE TRIAL COURT PROPERLY ALLOWED THE JURY TO CONSIDER THE TESTIMONY OF WITNESS COVEY RE-

^②See *Byas v. U. S.*, 182 F. 2d 94, 96-97 (CCA D.C. 1950) (no definition needed for word, “arrange”); *Shreve v. U. S.*, 103 F. 2d 796, 812 (CCA 9, 1939) (no definition needed for words, “affirmative acts”); and *Wishart v. U. S.*, 29 F. 2d 103, 105-106 (CCA 8, 1928) (no definition needed for word, “smuggling”).

^③See e.g., *Hart v. U. S.*, 112 F. 2d 128, 132 (CCA 5, 1940); *Schackow v. Government of the Canal Zone*, 108 F. 2d 625 (CCA 5, 1939). *Cf.*, *Coffin v. U. S.*, 162 U. S. 664, 674-675 (1896).

GARDING THE FALSITY OF THE REPRESENTATION THAT THE LITTLE AMERICA MOTEL ENTERPRISE HAD OFFERED TO PROVIDE THE ENTIRE CAPITAL FOR THE PROPOSED MOTEL INSURANCE COMPANY. (WALTERS-CAIN BRIEF, POINT III)

It is conceded by Terry that representations were made to investors substantially as alleged in Misrepresentation No. 9 of Count I of the Indictment. (Terry Br. 17). Apparently Cain attributed the origin of this statement to Walters. (R. 1094). Numerous witnesses testified that they were told that the Little America Motel interests were so enthused about the motel insurance company plan that they offered to advance the entire amount of capital required.

To prove the falsity of the representation, Mr. Stephen G. Covey was called and he testified that he and his family, together with some other associates, were the owners of the Little America and New America enterprises. He denied that he or his company had ever offered to invest in this motel insurance venture, pointing out that their insurance was purchased from his sister's husband who was in the insurance business (R. 250). He further testified that he did not think that his brother "even would be into the subject" and "would be very unapt to even discuss this type of thing to the extent of anything that was of an arranging nature". (R. 254).

It is submitted that Covey's testimony was properly admitted to prove that the Little America enterprise

had made no offer to finance the proposed motel insurance company. Obviously, any offer of commitment to the extent of furnishing \$100,000 or more would have required action of which Covey would have had notice. The Covey testimony was competent when admitted, and since it was uncontradicted, was conclusive of the falsity of the statements made.

Even conceding *arguendo* that the testimony of Covey left something to be desired to prove conclusively the lie relating to the alleged Little America offer, it would have been improper for the court to have instructed the jury to disregard this evidence. By so doing the court would have laid itself open to the criticism that by instructing the jury on the insufficiency of this proof, it inferentially was instructing them that the proof of all other issues was sufficient.

As stated the court in *United States v. Bookie*, 229 F. 2d 130, 134 (CCA 7, 1956):

“Obviously, it is improper for the court to cast suspicion or doubt on the testimony of any particular witness or to intimate that certain testimony is worthy or unworthy of belief, or that it is not conclusive. It follows that an instruction which singles out one established fact in the case and informs the jury that from that fact alone as a matter of law a certain conclusion does not follow, invades the province of the jury. 88 C.J.S., Trial, Secs. 276, 340 pp. 740, 908, citing cases; 64 C.J., Trial, Sec. 601 p. 690).”

Finally, as conceded by appellants, the Government is not required to prove each of the fraudulent representations alleged in the Indictment, provided that sufficient of them are proven to make out the scheme to defraud. *Levine v. U. S.*, 79 F. 364, 369 (CCA 9, 1935); As stated in *Lewis v. U. S.*, 38 F. 2d 406, 410 (CCA 9, 1930):

“... if any one of the material representations made were false and known to be so by the appellants, and that purchases were made in reliance thereon, the conviction must be sustained, regardless of the proof or failure of proof of other items of alleged fraud.”

IV

THE TRIAL COURT CORRECTLY INSTRUCTED THE JURY THAT A SCHEME TO DEFRAUD MAY INCLUDE LATER EFFORTS TO AVOID DETECTION OF THE FRAUD. (TERRY BR., POINT IV; WALTERS-CAIN BR., POINT V).

Appellants object to the following instruction of the trial court:

“A scheme to defraud may well include later efforts to avoid detection of the fraud. Avoidance of detection and prevention of recovery of the properly fraudulently obtained may be a material part of the illegal scheme.” (R. 1347).

Appellants contend that such a charge was prejudicial since there was no evidence that anyone except the defendant Jensen tried to cover up or avoid detection. (Walters-Cain Br. 31; Terry Br. 28).

The short answer to appellants' claim is that the instruction was properly given, against a background of ample evidence that the scheme here included efforts to avoid detection of fraud, and is a correct statement of the law. *Marshal v. U. S.*, 146 F. 2d 618, 620-621 (CCA 9, 1944); *U. S. v. Riedel*, 126 F. 2d 81 at 83 (CCA 7, 1942).

The "cover up" activities in this case were, in fact, an integral part of the scheme. Appellants' contention that Jensen alone participated in such activities does not square with the facts. All appellants knowingly sold surplus certificates not authorized by the Insurance Commissioner, for purposes falsely represented as having his approval, and all appellants kept on selling when the authorized limit had been reached. (R. 474-475). In January it was Terry who suggested that they could pick up these surplus certificates and give receipts for stock. The suggestion of giving back the investors money was rejected. (R. 478-480). It was Terry and Walters who then called on investors and told them the fantastic story that the company was about ready to start operations, that they wanted to put the money to work by construction of a motel, and that the stock had already doubled in value. (R. 153, 191, 321). All of this was done, according to Jensen, in furtherance of the scheme to cover up the unauthorized sale of surplus

certificates, while Jensen was doctoring the books (R. 480-482). During the period when Terry and Walters were urging investors to exchange their certificates for stock, or to waive getting their certificates, Terry and Walters told none of the investors that the Insurance Commissioner was making an examination and had ordered the unauthorized sale of surplus certificates stopped. As late as April, 1955, it was Terry who was allaying the concern of Mrs. Evanson and Elmer Schneidmiller when receivership proceedings were imminent. In defendants' plans the scheme certainly was far from ended. Had they been successful in deceiving the authorities and concealing their fraud from investors they would next have proceeded to sell stock in their venture (R. 1036, 1286-1287, 1304), no doubt reloading earlier purchasers with more worthless securities.

In the case of Cain it might be argued that he was not a party to this subsequent cover up activity, although he was aware of the oversale of surplus certificates (R. 1042), and that the company had never paid a dime of interest (R. 1050-1051), was a party to the secret agreement (Exhibit 46) and admitted that he did not make any inquiries or dis-

closures to the Insurance Commissioners. (R. 1098). However, Cain was a party to the scheme and the conspiracy and he is chargeable with the acts of his co-conspirators to carry the conspiracy to its completion until he has proven by affirmative action that he severed himself from it. *Pinkerton v. U. S.*, 328 U. S. 640, 646, 647; *U. S. v. Cohen*, 145 F. 2d 82 at page 90, and cases therein cited. No such showing was made by Cain to give merit to his objection to the instruction in question.

Appellants argue that the deception practiced in persuading investors to exchange their surplus certificates for receipts of stock could not be used to show a continuation of the fraudulent scheme. (Terry Br. 31; Walters-Cain Br. 33). This argument is based upon an erroneous understanding of the provisions of the Securities Act of 1933. Appellants urge that the provisions of 15 U.S.C.A., Sec. 77c (a) (9) exempt from the provisions of the Securities Act, "any security exchanged by the issuer with its existing security holders exclusively". They have overlooked the provisions of subsection (c) of 15 U.S.C.A., Sec. 77q, under which the securities fraud counts of the Indictment are charged. This paragraph provides:

"(c) The exemptions provided in Section 77c of this title shall not apply to the provisions of this section."

THE COURT PROPERLY EXCLUDED THE TESTIMONY OF MRS. FRANCES WALTERS. (WALTERS-CAIN BR., POINT VI.)^①

Mrs. Frances Walters, wife of appellant, was called as a witness and asked to relate a conversation had with Jensen in May, 1955. Although an offer of proof was made, the facts to which the witness would have testified are not clearly set forth. It is implied the testimony would have been that "Jensen was calling up trying to get Mr. Walters back and stating that everything was all right in the company." (R. 1317). (Walters-Cain Br. 34).

The court ruled that the testimony was of an impeaching nature and inadmissible because no proper foundation had been laid when Jensen was on the stand. (R. 1315). Appellants Walters and Cain apparently concede the correctness of this ruling, if the evidence were merely for impeachment purposes, but argue that the proffered testimony would be admissible to prove that Jensen might well have told Mrs. Walters that this company was prospering, and that she in turn communicated this to Walters (R. 1316), or to show that Jensen had received the appellants previously and throughout the entire course of the alleged fraudulent scheme.

^①Terry did not join in this specification of error.

We submit that the proffered testimony would have no probative value. It might as logically be speculated that Jensen made such a statement to Mrs. Walters to conceal from her that her husband was involved in a fraudulent scheme. In face of the mass of evidence showing appellants' full knowledge of the company's background and business, it would be naive to believe that he was as trusting of Jensen's assurances as his wife professed to be.

We submit that if Walters wished to contest with Jensen on whether Jensen made any statements to him, he was privileged to take the stand. Since he did not do so, he can scarcely complain to the court's failure to permit his wife to "stand in" and testify to what Jensen *might* have told Walters.

CONCLUSION

For reasons set out above it is submitted that the Judgment of the District Court should be affirmed.

Respectfully submitted,

WILLIAM B. BANTZ,
United States Attorney.

RINER E. DEGLOW,
Assistant United States Attorney.

No. 15,483

**United States Court of Appeals
For the Ninth Circuit**

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Judges of the Ninth Circuit.

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THE ARGUS PRESS, SEATTLE

FILED

MAY 8 1933

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APPELLANTS' PETITION FOR REHEARING

COME NOW Appellants Wilson H. Walters, Charles P. Cain and Keith Terry and petition this court for a re-hearing of the decision and judgment filed in this cause April 11, 1958.

I.

REASONS FOR GRANTING PETITION

A. The Court erred in holding that the following instruction, to-wit:

“A scheme to defraud may well include later efforts to avoid detection of the fraud. Avoidance of detection and prevention of recovery of property fraudulently obtained may be a material part of an illegal scheme.”

is a correct statement of the law.

B. The Court erred in holding there was sufficient evidence to sustain the giving of the aforesaid instruction.

II.

INTRODUCTION

The Appellants in this case were convicted of the crime of violating the fraud provisions of the Securities Act of 1933, the Mail Fraud Statutes and for conspiracy to violate said statutes. In the lower Court proceedings the trial Court instructed the jury as follows:

“A scheme to defraud may well include later efforts to avoid detection of the fraud. Avoidance of detection and prevention of recovery of property fraudulently obtained may be a material part of an illegal scheme.”

An exception was taken to this instruction on the grounds of insufficient evidence. This Court held on page 6 of its opinion that “the instruction was correct as a matter of law if applicable to the facts.” It is the position of appellants that under the *Gruenwald* Case (*Gruenwald v. United States* (1957) 353 U.S. 391, 1 L.Ed.2d 931, 77 Sup.Ct. 963) the instruction is not a correct statement of the law, and even if it is, there was not sufficient evidence, again under the *Gruenwald* Case, to give the instruction.

It should be pointed out that the *Gruenwald* Case was not decided until approximately seven (7) months after the trial of this case. Counsel for appellants has read the briefs submitted in this case and has discovered that the *Gruenwald* Case was not cited in any of the briefs nor in this Court’s decision. It is for this reason that appellants seek a rehearing on the matter of the aforementioned instruction.

III.

ARGUMENT

A. The Incorrectness of the Instruction.

1. Gruenwald Decision.

In *Gruenwald v. United States* (1957) 353 U.S. 391, 1 L.Ed.2d 931, 77 Sup.Ct. 963, the Supreme Court had before it a case in which the defendants were charged and convicted of "fixing" income tax evasion cases. The principal question in the case was whether or not the prosecution was barred by the Statute of Limitations. The indictment charged that the defendants had illegally secured "no prosecution rulings" from the Internal Revenue Bureau in 1948 and 1949. The Government further charged that as a part of the conspiracy and acts to defraud the United States, the defendants had sought to prevent the detection of their acts as late as 1952 (a three-year Statutes of Limitations was applicable and the indictments were returned on October 25, 1954). The acts of concealment consisted of the following: (1) After the "no prosecution ruling" was obtained, one of the defendants attempted to have the Internal Revenue Bureau's records "doctored," (2) there were extensive efforts to conceal the cash fee paid to Gruenwald, (3) another defendant caused the disappearance of certain records, (4) the taxpayers for whom the rulings were obtained were repeatedly warned not to make disclosures and not to reveal the conspiracy, (5) Gruenwald asked his secretary not to talk to the grand jury and (6) another defendant committed perjury before the grand jury. The Government contended that the conspiracy continued until at least 1952 on two

grounds. (1) that the acts of concealment were necessary to avoid detection of the crime and (2) that the acts of concealment were necessary to protect the taxpayers because the Statute of Limitations on the taxpayers did not run until 1952.

The Supreme Court absolutely rejected the Government's first contention. The Court pointed out that in all conspiracies the conspirators will seek to escape detection and held that acts which are designed to prevent apprehension are not a part of the conspiracy. At 353 U.S. 405, the Court stated as follows:

“A vital distinction must be made between the acts of concealment done in furtherance of the *main* criminal objectives and acts of concealment after the central objectives have been obtained.”

The Court gave two illustrations. In the first it pointed out that kidnappers might conceal their identity and purpose in order to obtain the ransom money. In the second illustration the kidnappers after obtaining the ransom money and releasing the kidnapped person sought to hide the traces of their crime. The first illustration demonstrates a situation in which the acts of concealment were done in the furtherance of the crime whereas the second illustration demonstrates acts which were done as a means of escaping detection and which illustration was applicable to the *Gruenwald* Case. The Court therefore held that if the aim of the conspiracy was to obtain “no prosecution rulings” the overt acts of concealment could not be taken as part of the conspiracy.

The Supreme Court conceded that if the aim of the

conspiracy was to protect the taxpayers from tax prosecution and if the overt acts were in the furtherance of that purpose, then the overt acts could be a part of the conspiracy. The Court noted that in order to protect the taxpayers from tax prosecution it would be necessary to conceal the illegal acts until the Statute of Limitations had run. The Court held however, that the trial court in its charge to the jury did not distinguish between concealment in order to achieve the central purpose of the conspiracy and concealment to cover up an already existing crime. At 353 U.S. 415, the Court stated:

“It is incumbent on the Judge to charge that in order to convict the jury would have to find that the central aim of the conspiracy was to immunize the taxpayers from prosecution and this objective continued in being until October 25, 1951 . . .”

The *Gruenwald* Case thus clearly establishes that acts done to escape apprehension or detection of the wrongful act may only be considered as a part of the crime if the concealment is necessary to obtain the central purpose of the crime.

2. This Court's Decision

This Court in passing upon appellants alleged error held that the instruction was the correct statement of the law, relying upon *United States v. Riedel* (7 Cir. 1942) 126 F.2d 81. It is Appellant's position that the *Riedel* Case is not a correct statement of the law and is repugnant to the decision of the United States Supreme Court in the *Gruenwald* Case. In the *Riedel* Case the question before the Court was whether or not use

of the mails after the defendants had fraudulently obtained certain sums was in furtherance of a scheme to defraud. The pertinent language is cited at 126 F.2d 83:

“We are satisfied however, that the evidence shows, and rather clearly, that the scheme was not over. A scheme to defraud may include later efforts to avoid detection of the fraud. A fraudulent scheme would hardly be taken save for the profit to the plotters. Avoidance of detection and prevention of recovery of money lost by the victim are within, and often a material part of, the illegal scheme. Further profit from the scheme to defraud, as such, may be over, and yet the scheme itself be not ended.”

The reasoning of the *Riedel* Case is directly contrary to the holding of the *Gruenwald* Case that the crime is completed upon the obtainment of the central purposes. As pointed out in the *Gruenwald* Case every conspiracy will have as one of its purposes the avoidance of detection and punishment. Certainly, every scheme to defraud will have as one of its purposes the retainment of the funds obtained through the fraud. Appellants respectfully contend that there is no distinction between acts performed to conceal the fraudulent acts in order to escape punishment and acts performed to conceal the wrongful acts in order to retain the profits of the fraudulent venture. Certainly the *Riedel* Case and all cases with similar reasoning have been, in effect, overruled by the Supreme Court in the *Gruenwald* Case. Appellants therefore respectfully contend that the decision of this court was based upon a case which is no longer a correct statement of the law.

3. Reversible Error.

Admittedly, counsel in the lower court did not except to the objectionable instruction on the grounds that it was erroneous statement of the law. As pointed out previously however, this case was tried approximately seven (7) months before the decision in the *Gruenwald* Case and counsel, realizing that the instruction was objectionable, did raise objection to it. The Court may consider errors in instruction thought to have resulted in a miscarriage of justice. *Bryson v. United States* (9 Cir. 1956) 238 F.2d 657. Also, as stated in the *Gruenwald* Case, it was incumbent upon the trial court to point out the distinctions between acts of concealment done in furtherance of the main criminal objective and acts of concealment done after the central objectives had been obtained. Appellants in no way seek to criticize the lower court in failing to instruct on the above distinction but merely contend that in order to have a fair trial, that distinction should have been made in the court's instruction.

The distinction between acts done in order to avoid detection and acts done to obtain the central objectives could have been one of the most important factors considered by the jury. One need only make a cursory reading of the record in this case to determine that appellants' position was that they were relying on the representations made by Mr. Jensen and that their representations were made in good faith. There was evidence from which the jury could find that the appellants in order to prevent detection of the alleged fraud made efforts to pacify the buyers of the surplus certificates

while Jensen was doctoring the books (R. 478-482). From this the jury could have believed that the appellants had been acting in concert with Mr. Jensen throughout the whole transaction. Yet to the *Gruenwald* Case the jury is not allowed to consider these later acts as part of the scheme to defraud. In *Krulenwitch v. United States* (1948) 336 U.S. 440, 93 L.Ed. 790, 69 Sup.Ct. 716 and *Lutwak v. United States* (1953) 344 U.S. 604, 97 L.Ed. 593, 73 Sup.Ct. 41, the two cases relied upon by the Supreme Court in the *Gruenwald* Case, somewhat similar evidence was held inadmissible on the grounds that hearsay evidence was inadmissible against conspirators after the central objectives of the conspiracy had been obtained. The instruction in question was clearly error and since it pertained to a material part of the case and an exception was taken to it, the appellants should be entitled to a new trial.

B. Insufficiency of Evidence.

Even assuming that the instruction does not constitute reversible error as a matter of law, it is the position of the appellants that there was insufficient evidence under the *Gruenwald* case to give the instruction. In order to obtain this instruction the government must have proved that the acts to escape detection must have been a main objective of the conspiracy and the scheme to defraud. The main objective of a scheme to defraud is obtained when the wrongdoer obtains the funds for his own purposes and for which he made the misrepresentations. It was therefore incumbent upon the government to introduce evidence from which the jury could have found beyond a reasonable doubt, that

the appellants performed the alleged acts of concealment in order to commit further fraud. In only one place in its brief does the government make such a contention. At page 49 of its brief the government states:

“In defendants’ plans the scheme certainly was far from ended. Had they been successful in deceiving the authorities and concealing their fraud from investors they would thus have proceeded to sell stock in their venture (R. 1036, 1286-1287, 1304), no doubt reloading earlier purchasers with more worthless securities.”

In the first place this contention is completely unsupported in the part of the record cited by the government or elsewhere. Secondly, and assuming that the evidence does show the facts as contended by the government this concealment to deceive the authorities and hide their fraud from the investors must have been in furtherance of the scheme. In other words, the government must have proven that the appellants foresaw the necessity of deceiving the authorities and concealing their fraud from the investors and that their acts were carried out in furtherance of that plan. It was pointed out in the *Gruenwald* case that there must be an agreement between the conspirators to protect the tax payers from tax prosecution and the overt acts must be in furtherance of that purpose. There is absolutely no evidence that the appellants agreed to deceive the authorities so that they might defraud future stock purchasers. In fact, the only evidence which the court had in mind in granting this instruction was the picking up of the surplus certificates by the appellants (R. 1364). This was done after the insurance commission had be-

gun to make inquiries (R. 481) and could be interpreted, at most, as a device to avoid detection.

There being insufficient evidence that the alleged acts of concealment were for the purposes of obtaining the central objectives of the scheme to defraud, the instruction in question should not have been given. As previously discussed, this instruction was prejudicial to the appellants and constitutes reversible error.

IV.

CONCLUSION

The *Gruenwald* Case, decided approximately seven (7) months after this case was tried, establishes a rule of law which manifests that the court's instruction regarding avoidance of detection is not a correct statement of the law and in any event establishes that there was not sufficient evidence for the giving of that instruction. The instruction was detrimental to appellants' theory of the case and was therefore prejudicial. Though trial counsel did not object to it on the ground that it incorrectly stated the law, it was excepted to and in the interest of justice the appellants should be granted a new trial. Counsel did except to the instruction on the grounds of insufficient evidence and therefore did preserve the record on this particular point. Wherefore, appellants respectfully pray that this petition for rehearing be granted.

DATED at Seattle, Washington, May 6, 1958.

Respectfully submitted,

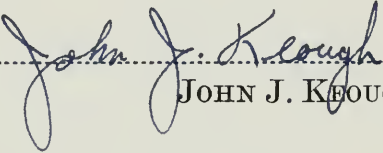
JOHN J. KEOUGH

Attorney for Appellants.

725 Central Building,
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CERTIFICATE OF COUNSEL

JOHN J. KEOUGH counsel for appellants herein hereby certifies that in his judgment the foregoing petition for rehearing is well founded and is not interposed for delay.



JOHN J. KEOUGH.

No. 15,493

IN THE

**United States Court of Appeals
For the Ninth Circuit**

FRED BRIDGES,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

On Appeal from the United States District Court for the
Northern District of California.

BRIEF OF APPELLEE.

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United States Attorney,

RICHARD H. FOSTER,

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FILED

JUN 27 1957

PAUL P. O'BRIEN, CLERK

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No. 15,493

IN THE

United States Court of Appeals
For the Ninth Circuit

FRED BRIDGES,

VS.

UNITED STATES OF AMERICA,

Appellant,

Appellee.

On Appeal from the United States District Court for the
Northern District of California.

BRIEF OF APPELLEE.

JURISDICTION.

Jurisdiction is invoked under Section 2255 of Title 28, United States Code.

STATEMENT OF THE CASE.

Appellant was indicted in Criminal No. 33917 in three counts for violation of the narcotic laws of the United States. The first count charged a violation of the Harrison Narcotics Act by selling heroin. The second count charged that at the same time and place appellant violated the Jones-Miller Act by concealing heroin. The fifth count of the indictment¹ charged the

¹Appellant was indicted with a man named Nayland Jackson who was named alone in the third and fourth counts of the indictment.

appellant and Nayland Jackson with conspiracy to sell and conceal heroin.

On May 26, 1954 appellant withdrew his plea of not guilty to the indictment in the following manner:

“Mr. Sullivan. As far as this particular indictment is concerned, I desire to withdraw the plea of not guilty heretofore entered for the purpose of presenting a new and different plea as to the first two counts.

The Court. The Court will accept the plea, there being no objection on your part?

Mr. Foster. No objection.

The Clerk. In case 33817, Fred Bridges, do you withdraw your former plea of not guilty to counts one, two and three of this indictment?

Defendant Bridges. Yes.

The Court. The plea is “yes”; guilty?

Mr. Sullivan. As to his—

The Clerk. Withdrawal. What is your plea, Fred Bridges, to counts one and two of this indictment, guilty or not guilty?

Defendant Bridges. Guilty.

Mr. Sullivan. Same transaction.

The Court. The other counts may be dismissed. You have had the advice of your attorney, Mr. Sullivan, in this matter, have you?

Mr. Sullivan. Yes, Your Honor. Talked to him.

Defendant Bridges. Yes, Judge, Your Honor, I understand I am pleading to one count.

Mr. Sullivan. One transaction. Well, it is one transaction, Mr. Bridges. It is simply as I told you before—two different statutes, that’s all.

The Court. There isn't any question in his mind?
Mr. Sullivan. No, not at all, Your Honor."

Prior to appellant's sentence the Court was informed of the appellant's prior record, which included sentences for assault with intent to commit murder and burglary, and arrest for assault, burglary, robbery, narcotics, vagrancy, gambling, and suspicion of assault with a deadly weapon. (Tr. 5.) In addition, the Court was informed that while appellant was on bail from the instant charge he had committed another narcotic offense in violation of the laws of the State of California (Tr. 5-6).² On June 16, 1954, almost a month later, appellant was sentenced. The Court prior to sentencing inquired directly of appellant: "Are you ready for sentence?" The defendant answered: "Yes, Your Honor." (Tr. 14.) Appellant was then sentenced to 5 years on the first count charging a violation of the Harrison Narcotics Act in that appellant sold heroin, and to a term of 5 years on the second count of the indictment charging the concealment of the heroin referred to in the first indictment, and the terms of imprisonment were ordered to run consecutively (Tr. 14). Appellant at that time made no statement of any kind, nor did his retained counsel, concerning the consecutive sentences received. The Court then dismissed a second indictment numbered 33918 against the defendant charging a violation of the narcotic laws. On May 17, 1955 appellant's first motion to vacate sentence under Section 2255 of Title 28 United States Code was denied by Judge Harris.

²Tr. references refer to the Transcript of the proceedings on Plea No. 10 in the Record.

Appellant did not appeal from the denial of this motion. On January 14, 1957, almost three years after the appellant was sentenced, the instant motion under Section 2255 was filed. On February 17, 1957, with appellant represented by counsel, appellant's motion to vacate was denied. Appeal is made from this order.

QUESTIONS PRESENTED.

1. Was the Court required to entertain a second motion for relief under Section 2255?
2. May there be consecutive sentences for the concealment of heroin and the sale of that heroin when the first sentence is imposed under the Jones-Miller Act and the second sentence is imposed under the Harrison Narcotics Act?
3. Was appellant deprived of due process of law in his plea of guilty and his sentence thereupon?

ARGUMENT.

I.

APPELLANT MAY RECEIVE CONSECUTIVE SENTENCES FOR THE CONCEALMENT OF HEROIN AND THE SALE OF THE SAME HEROIN CONCEALED.

Appellant was sentenced to five years imprisonment on the first count of the indictment which charged him with a violation of the Harrison Narcotics Act. This count charged that appellant on the 7th of January, 1954, in Oakland, California "did sell, dispense and

distribute not in or from the original stamped package" approximately 12 grains of heroin. On the second indictment he was sentenced to a term of five years to run consecutively to the five years he received under the first count of the indictment. The second count of the indictment charged him with concealing and facilitating the concealment of approximately 12 grains of heroin at the same time and place as charged in the first count of the indictment. The first count charged a violation of the Harrison Narcotics Act, 26 U.S.C. 2553 and 2557, and the second count of the indictment charged a violation of the Jones-Miller Act, 21 U.S.C. 174. Appellant contends that he received double punishment because the inference is that the 12 grains of heroin referred to in the first count of the indictment also were involved in the second count of the indictment. It is appellant's claim that proof of the two counts of the indictment would have involved the identical evidence and hence would constitute but one criminal offense subject to but one penalty.

The Supreme Court has heretofore considered the contention that sale and possession of contraband can constitute but one single offense. In *Albrecht v. United States*, 273 U.S. 1, the appellant was convicted of both sale of liquor and possession of liquor. The Supreme Court held, however, as follows:

"The contention is that there was double punishment because the liquor which the defendants were convicted for having sold is the same that they were convicted for having possessed. But possessing and selling are distinctive offenses. One may obviously possess without selling; and one

may sell and cause to be delivered a thing of which he has never had possession; or one may have possession and later sell, as appears to have been done in this case. The fact that the person sells the liquor which he possesses does not render the possession and the sale necessarily a single offense. There is nothing in the constitution which prevents Congress from punishing separately each step leading to the consummation of a transaction which it has power to prohibit and punishing also the completed transaction.”

In *Blockburger v. United States*, 248 U.S. 299, the Supreme Court held to the same effect in a case involving the narcotic laws, involving but one transaction. There the Court announced a general rule that the test to be applied is to be determined whether there were two offenses or only one is whether each requires proof of a fact which the other does not. This Court has also ruled many times adversely to the position taken here by appellant.

Gargano v. United States (9th Cir.), 140 F.2d 118;

Bruno v. United States (9th Cir.), 164 F.2d 693, cert. den.;

Toliver v. United States (9th Cir.), 224 F.2d 742.

Here the evidence, of course, supporting count one would not have been identical with the evidence supporting count 2. To prove count one, evidence would necessarily have to establish that appellant sold narcotics. Furthermore, appellant could have sold the

heroin without ever having concealed it or facilitated the concealment thereof.

II.

APPELLANT WAS NOT DEPRIVED OF DUE PROCESS BY HIS PLEA OF GUILTY AND HIS SENTENCE.

Section 2255 in its terms provides that "a court may entertain and determine [a motion under Section 2255] without requiring production of the prisoner at the hearing." Where it appears from the motion, file, and records in the case that prisoner is entitled to no relief, then no Findings of Fact and Conclusions of Law are required by the Court.

Birtch v. United States (4th Cir.), 173 F.2d 316.

It would destroy prison discipline to put the election of travel in the hands of prisoners serving a sentence.

Carvell v. United States (4th Cir.), 173 F.2d 340.

As the Court stated in *Crowe v. United States*, 175 F.2d 799 at 801:

"Only in very rare cases, we think, will it be found necessary for a court to order a prisoner produced for a hearing under 28 U.S.C.A. Sec. 2255. Certainly, whether or not the court should require him to be brought into court for the hearing is a matter resting in the court's discretion. Production of the prisoner should not be ordered merely because he asks it, but only in those cases

where the court is of opinion that his presence will aid the court in arriving at the truth of the matter involved . . .”

In the *Crowe* case appellant had claimed that he had been tricked by one of his attorneys. The Court, however, held that the prisoner there should have raised the question at the time of his original trial and at the time of sentence here as there as the Court stated “the matter set forth by the motion as grounds for relief were matters which could have been raised in the proceeding in which the sentence was imposed.” In the instant case appellant was asked almost a month after he first raised some question concerning his plea whether he had anything to say before sentence. He answered “No.” His counsel at the time of his plea informed the Court that he had already discussed the matter of a plea to two counts of the indictment with appellant. Furthermore, appellant’s retained counsel actually withdrew his plea of not guilty by indicating that appellant desired to plead to two counts of the indictment. Appellant did not raise any question at the time of his sentence or afterwards until the present motion, which was brought more than two years after judgment. As the court stated in *Bloombaum v. United States* (4th Cir.), 211 F.2d 944: “If he had any defense to the charge he should have presented it at the time.” In *United States v. Lowe* (2d Cir.), 173 F.2d 346, the petitioner there charged that a promise of probation had induced his plea of guilty. The court held, however, that he should have protested at the time of sentence.

Appellant had numerous chances before now to raise the issue of his claimed lack of knowledge of his plea to two counts of the indictment. He could have discussed the matter with his probation officer. He could have raised the question prior to sentence on June 16. He could have made some statement of complaint immediately after sentence was pronounced. He could have made a motion to modify within 60 days of his sentence under Rule 35 of the Federal Rules of Criminal Procedure. However, he did none of these things. He made no complaint concerning his sentence until almost three years after judgment. As a matter of fact he even neglected to raise the point on his first motion to reduce sentence under Section 2255.

III.

THE COURT WAS NOT REQUIRED TO ENTERTAIN APPELLANT'S SECOND MOTION.

It appears that appellant applied for relief under Section 2255 of Title 28 on a prior occasion. The District Court denied this motion on May 17, 1955. It does not appear that appellant appealed from this denial. The court in its order on the first motion indicated that the appellant here applied for relief on the grounds that he had received double punishment. This, of course, is the almost identical ground on which he claims relief in the present motion. Section 2255 provides that "The sentence court shall not be required to entertain a second or successive motion for relief on behalf of the same prisoner." This court in *Win-*

hoven v. Swope (9th Cir.), 195 F.2d 181-183, has held that a court is without jurisdiction to entertain a successive motion for relief. See also *Winhoven v. United States* (9th Cir.), 221 F.2d 793. The District Court here was clearly not required to do more than it did, namely, give appellant through his counsel and by means of the motion, files and records in the case, an opportunity to present his position. This the Court did and then denied the motion. Section 2255 was designed in part to avoid the problems of repetitious writs for habeas corpus. Clearly, one of the reasons for the enactment of Section 2255 was to minimize the time waste caused by the relitigation of cases which have theretofore received exhaustive judicial attention. See *Hayden v. Swope*, 342 U.S. 205 at pages 212 through 219. See also *Madigan v. Wells* (9th Cir.), 224 F.2d 577. Cert. denied.

CONCLUSION.

Because appellant had been previously denied relief under Section 2255 the Court was not required to entertain his motion, but even considering the motion on its merits it was properly denied. The judgment of the District Court should be affirmed.

Dated, June 21, 1957.

LLOYD H. BURKE,
United States Attorney,

RICHARD H. FOSTER,
Assistant United States Attorney,

Attorneys for Appellee.

No. 15495

United States
Court of Appeals
for the Ninth Circuit

SLEEPER LOUNGE COMPANY, a Co-partnership Consisting of Charles Kunzelman and James A. Anderson; CHARLES KUNZELMAN and JAMES A. ANDERSON,

Appellants,

vs.

BELL MANUFACTURING COMPANY, a Corporation,

Appellee.

Transcript of Record

Appeal from the United States District Court for the
Southern District of California
Central Division.

PAUL P. O'BRIEN, CLERK

No. 15495

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SLEEPER LOUNGE COMPANY, a Co-partnership
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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In the United States District Court for the Southern District of California, Central Division

Civil Action No. 17779-WB

BELL MANUFACTURING COMPANY, a Corporation,

Plaintiff,

vs.

SLEEPER LOUNGE COMPANY (a Co-partnership, Consisting of Charles Kunzelman and James A. Anderson), CHARLES KUNZELMAN and JAMES A. ANDERSON,

Defendants.

COMPLAINT FOR TRADE-MARK INFRINGEMENT AND UNFAIR COMPETITION

Trade-mark Reg. No. 377,752

Now Comes the Plaintiff in the above-entitled action and for its complaint alleges as follows:

1. Plaintiff is a Corporation of the State of California, having its principal place of business in the City and County of San Francisco, State of California. [2*]

2. Defendant Sleeper Lounge Company, is a Co-partnership, consisting of Charles Kunzelman and James A. Anderson, and has its principal place of business in the County of Los Angeles, State of California, and within the Southern District of California, Central Division;

*Page numbering appearing at foot of page of original Certified Transcript of Record.

3. The Defendants, Charles Kunzelman and James A. Anderson, are individuals residing in the County of Los Angeles, State of California, and in the Southern District of California, Central Division;

4. This action arises under the Trade-mark Act of July 5, 1946, 60 Stat. 427; U.S.C. Title 15, Chapter 22, as hereinafter more fully appears, and is a suit for infringement and unfair competition with respect to a Trade-mark registered in the United States Patent Office;

5. Prior to 1940, Plaintiff's predecessor, Bell Manufacturing Company, a co-partnership composed of Joseph D. Bell and Pearl B. Bell, adopted and used the Trade-mark "Wonder Chair" in connection with the sale in interstate commerce of Reclining Chairs and Convertible Chair Beds;

6. On May 14, 1940, upon application duly made and prosecuted before the United States Patent Office, the said Patent Office duly granted to said Bell Manufacturing Company, a co-partnership, Registration Certificate No. 377,752, in accordance with the Act of February 20, 1905, as amended, the said Certificate of Registration covering the Trade-mark "Wonder Chair" in connection with Reclining Chairs and Convertible Chair Beds, in Class 32, Furniture and Upholstery; [3]

7. On or about the 19th day of July, 1947, Bell Manufacturing Company, a corporation, the Plaintiff in the present action, was formed under the

laws of the State of California, and subsequently acquired the assets, good will and the said Trade-mark from the co-partnership, as evidenced by an Assignment executed on the 23rd day of July, 1953, and recorded in the United States Patent Office on August 10, 1953, in Liber Z 236, Page 654;

8. The said Bell Manufacturing Company, a corporation, and its predecessor, Bell Manufacturing Company, a co-partnership, have continuously used the said Trade-mark on the goods specified, and on other goods of similar character, such as Love Seats, Twin Recliners, Cushioned Divans and Chesterfield Beds, in interstate commerce ever since its adoption prior to 1940, and are still using the said Trade-mark as aforesaid;

9. On September 14th, 1948, Bell Manufacturing Company, a co-partnership, caused the said Trade-mark to be republished in the Official Gazette of the United States Patent Office under the provisions of Section 12(c) of the Trade-mark Act of 1946;

10. On March 5th, 1954, the said Bell Manufacturing Company, a corporation, filed its combined Affidavit under the provisions of Sections 8 and 15 of the Trade-mark Act of 1946, and the affidavit was made of record in the registration file as evidenced by a Certificate from the Patent office dated April 24th, 1954. Under Section 15 of said Trade-mark Act, the right of said Bell Manufacturing Company to use said Mark in commerce for the goods specified has become incontestable, and under

Section 33 of the said Trade-mark Act, the said Certificate is conclusive evidence of the exclusive right of said Bell Manufacturing Company [4] to the use of the said Trade-mark on said goods in commerce subject to the provisions of said Section;

11. Defendants, and each of them, have, in interstate trade, and without the consent of plaintiff, used reproductions, counterfeits, copies, and colorable imitations of said registered Trade-mark, Registration No. 377,752, in connection with the sale, offering for sale, and advertising of goods in connection with which such use is likely to cause confusion or mistake or to deceive purchasers as to the source of origin of such goods, as follows: the Defendants have recently adopted and are now using the Trade-mark "Wonder Bed" for a lounge or contour bed, which is adjustable for use as a bed, and a lounge, and have employed the Trade-mark "Wonder Bed" in the sale, offering for sale and advertising of their contour bed and lounge in commerce among the several States; more specifically, Defendants have caused to be inserted in the Los Angeles Times Home Magazine Section of December 5, 1954, and other publications, advertisements of their contour bed and lounge identified therein as the "Wonder Bed." The said Los Angeles Times is a newspaper of wide circulation and is sold in a number of States of the United States;

12. The said lounge and contour bed thus sold and distributed by the Defendants has substantially the same descriptive properties as Plaintiff's chair

bed, and belongs in the same Patent Office Classification, namely Class 32, Furniture and Upholstery;

13. Due notice has been given to the public by the Plaintiff of the registration of its Trade-mark "Wonder Chair" by displaying with the Trade-mark as used, the words "Registered U. S. Patent Office," and special notice has been given to the Defendants of the infringement of said Trade-mark in a letter [5] dated November 3rd, 1954, and addressed to Sleeper Lounge Company, 3279 Wilshire Boulevard, Los Angeles, California; and the Defendants have refused to cease using the infringing Trade-mark after having acknowledged receipt of said letter.

Wherefore, Plaintiff prays:

- (1) For damages, including profits of Defendants;
- (2) For a preliminary injunction and for a permanent injunction enjoining:
 - (a) Unfair competition by Defendants;
 - (b) The use of the Trade-mark "Wonder" or any confusingly similar Trade-mark by Defendants, and,
 - (c) Infringement of Trade-mark Registration, No. 377,752 by Defendants;
- (3) For its cost of suit, including attorneys' fees;

(4) That the court order all labels, signs, prints, packages, wrappers, receptacles and advertisements in the possession of Defendants, bearing the Registered Mark or any reproduction, counterfeit, copy, or colorable imitation thereof, and all plates, molds, matrices, and other means of making the same to be delivered up and destroyed, and

(5) Such other and additional relief as the circumstances of the case may require.

ADELBERT SCHAPP and
ELLIOTT & PASTORIZA,

By /s/ WILLIAM J. ELLIOTT,
Attorneys for Plaintiff.

[Endorsed]: Filed January 17, 1955. [6]

[Title of District Court and Cause.]

ANSWER

Come now the defendants Sleeper Lounge Company, Charles Kunzelman and James A. Anderson and, through their attorney and answering the complaint, allege as follows:

I.

Answering Paragraph 1 of the complaint, defendants admit the allegations thereof.

II.

Answering paragraph 2 of the complaint, defendants admit the allegations thereof.

III.

Answering Paragraph 3 of the complaint, defendants admit the allegations thereof. [7]

IV.

Answering Paragraph 4 of the complaint, defendants admit the allegations thereof.

V.

Answering Paragraph 5 of the complaint, defendants state that they are without knowledge or information sufficient to form a belief as to the truth of the allegations thereof.

VI.

Answering Paragraph 6 of the complaint, defendants state that they are without knowledge or information sufficient to form a belief as to the truth of the allegations thereof.

VII.

Answering Paragraph 7 of the complaint, defendants state that they are without knowledge or information sufficient to form a belief as to the truth of the allegations thereof.

VIII.

Answering Paragraph 8 of the complaint, defendants state that they are without knowledge or information sufficient to form a belief as to the truth of the allegations thereof.

IX.

Answering Paragraph 9 of the complaint, defendants state that they are without knowledge or information sufficient to form a belief as to the truth of the allegations thereof.

X.

Answering Paragraph 10 of the complaint, defendants state that they are without knowledge or information sufficient to form a belief as to the truth of the allegations thereof.

XI.

Answering Paragraph 11 of the complaint, defendants deny each and every allegation thereof. [8]

XII.

Answering Paragraph 12 of the complaint, defendants deny each and every allegation thereof.

XIII.

Answering Paragraph 13 of the complaint, defendants admit receipt by them of notice of infringement by way of letter dated November 3, 1954, addressed to Sleeper Lounge Company, 3279 Wilshire Boulevard, Los Angeles, California; further answering said Paragraph, defendants deny that they have infringed said trade-mark or have refused to cease using any infringing trade-mark; and further answering said Paragraph, defendants are without knowledge or information sufficient to form

a belief with respect to the truth of the remaining allegations thereof.

As Further and Separate Defenses, Defendants Allege as Follows:

First Defense

The trade-mark set forth in registration 377,752 is merely descriptive and in the public domain. Furthermore, the trade-mark has acquired no secondary meaning. Defendants further allege that if plaintiff owns any rights whatever in the alleged trade-mark, which defendants deny, said rights are limited to the specific mark, which is not infringed by defendants' mark.

Second Defense

That the trade-mark set forth in registration 377,752 is incapable of trade-mark significance. In this regard, defendants allege that the word "Wonder" has long been in general use by many manufacturers in describing their products and specifically has been used by many concerns engaged in the manufacture of love seats, twin reclining couches, divans, Chesterfield beds and lounges or contour beds. [9]

Third Defense

Defendants allege that they have made no trade-mark use of "Wonder" or "Wonder Bed" but have merely utilized such terms to describe products sold by them.

Wherefore, Defendants Pray:

1. That the complaint be dismissed and that the complainant take nothing thereby.
2. That defendants have their costs herein expended, including a reasonable attorney's fee.
3. For such other and further relief as the Court may deem proper.

SLEEPER LOUNGE
COMPANY,

CHARLES KUNZELMAN and
JAMES A. ANDERSON;

By /s/ R. DOUGLAS LYON,
Their Attorney.

Affidavit of service by mail attached.

[Endorsed]: Filed February 25, 1955. [10]

[Title of District Court and Cause.]

ANSWERS TO INTERROGATORIES
BY DEFENDANTS

* * *

7. Please list in detail and identify each and every form of advertisement or sales media (including brochures, other [28] literature, television, radio, billboards, other sign displays, pamphlets, newspapers, and the like) in which you have used or authorized the use of the phrase "The Wonder

Bed” and/or the phrase “Wonder Bed,” setting forth further when each use was commenced, how long each use has or did continue, and when each use was stopped, if stopped before the commencement of the above-entitled action.

Answer: As presently advised, defendants believe that the descriptive phrase The Wonder Bed was probably used in the following advertisements:

1. Brochures—15,000 printed for use as of August 31, 1954.

2. Truck Sides—Painted September 17, 1954, 1 truck, currently in use.

3. Billboards—3 in use, 1 since Oct. 15, 1954; 2 as of Nov. 8, 1954.

4. L. A. Times Home Magazine—Oct. 3, 1954; also Oct. 17, 31; Nov. 7, 14, 21, 28; Dec. 5, 12, 19, 26; Jan. 2, 9, 16, 23, 30; Feb. 13, 20, 27.

5. L. A. Examiner Pictorial Magazine—Nov. 7, 1954; also Nov. 14, 21, 28; Dec. 5, 12, 19; Jan. 2, 9, 16, 23.

6. Catholic Directory—October Publication date (annual).

7. Hollywood Reporter—Oct. 11, 1954, plus Oct. 26; Nov. 8, 23; Dec. 3, 9, 15.

8. Daily Variety—Oct. 7, 1954, plus Oct. 20; Nov. 5, 17, 29; Dec. 9, 14.

9. Playgoer—October, 1954, all weeks; also weeks of Nov. 22, 29; Dec. 6, 13.

10. Beverly Hills Newslife—Oct. 13, 1954; Oct. 18, 25; Nov. 8, 15, 22, 29; Dec. 6.
11. Canyon Crier—Oct. 14, 1954; Oct. 28; Nov. 11, 25; Dec. 9.
12. Christmas Mailers—1000 completed Dec. 9, 1954.
13. L. A. Herald Express—Nov. 25, 1954.
14. KCBH Radio Spots—Month of December, 1954.
15. Pasadena Star-News—Dec. 3, 1954; [29] Dec. 10.
16. Newport—Balboa News, Dec. 7, 1954.
17. Newport—Balboa Press, Dec. 2, 1954.
18. Hollywood Citizen News—Dec. 3, 1954; Dec. 10.
19. Valley Times—Dec. 3, 1954; Dec. 7, 10.
20. L. A. County Medical Directory (annual), December, 1954. [30]

* * *

SLEEPER LOUNGE
COMPANY,

By /s/ CHARLES KUNZELMAN.

[Endorsed]: Filed April 19, 1955. [35]

[Title of District Court and Cause.]

FINDINGS OF FACT AND
CONCLUSIONS OF LAW

This cause, having come on to be heard upon the Complaint and Answer and the Court having heard the testimony of the witnesses and the arguments of counsel, the Court does hereby enter its Findings of Fact:

Findings of Fact

1. Plaintiff is a corporation of the State of California having its principal place of business in the City and County of San Francisco, State of California. [147]

2. Defendant, Sleeper Lounge Company, is a co-partnership consisting of Charles Kunzelman and James A. Anderson, and has its principal place of business in the County of Los Angeles, State of California, and within the Southern District of California, Central Division;

3. The defendants, Charles Kunzelman and James A. Anderson, are individuals residing in the County of Los Angeles, State of California, and in the Southern District of California, Central Division;

4. This action arose under the Trade-mark Act of July 5, 1946, 60 Stat. 427; U.S.C. 15, Chapter 22, as hereinafter more fully appears, and was a suit for infringement and unfair competition with re-

spect to a trade-mark registered in the United States Patent Office.

5. Prior to 1940, Plaintiff's predecessor, Bell Manufacturing Company, a co-partnership composed of Joseph D. Bell and Pearl B. Bell, adopted and used the trade-mark "Wonder Chair" in connection with the sale in interstate commerce of Reclining Chairs and Convertible Chair Beds;

6. On May 14, 1940, upon application duly made and prosecuted before the United States Patent Office, the said Patent Office duly granted to said Bell Manufacturing Company, a co-partnership, Registration No. 377,752, in accordance with the Act of February 20, 1905, as amended, the said Certificate of Registration covering the trademark "Wonder Chair" in connection with Reclining Chairs and Convertible Chair Beds, in Class 32, Furniture and Upholstery; [148]

7. On or about the 19th Day of July, 1947, Bell Manufacturing Company, a corporation, the Plaintiff in the present action, was formed under the laws of the State of California, and subsequently acquired the assets, good-will and the said trade-mark from the co-partnership, as evidenced by an Assignment executed on the 23rd Day of July, 1953, and recorded in the United States Patent Office on August 10, 1953, in Liber Z 236, Page 654;

8. The said Bell Manufacturing Company, a corporation, and its predecessor, Bell Manufacturing Company, a co-partnership, have continuously

used the said trade-mark on the goods specified, and on other goods of similar character, such as Love Seats, Twin Recliners, Cushioned Divans and Chesterfield Beds, in interstate commerce ever since its adoption prior to 1940, and are still using the said trade-mark as aforesaid.

9. On September 14th, 1948, Bell Manufacturing Company, a co-partnership, caused the said trade-mark to be republished in the Official Gazette of the United States Patent Office under the provisions of Section 12 (c) of the Trade-mark Act of 1946;

10. On March 5th, 1954, the said Bell Manufacturing Company, a corporation, filed its combined Affidavit under the provisions of Sections 8 and 15 of the Trade-mark Act of 1946, and the Affidavit was made of record in the registration file as evidenced by a Certificate from the Patent Office dated April 24th, 1954.

11. Defendants, and each of them, have, in interstate commerce, and without the consent of Plaintiff, used reproductions, counterfeits, copies, and colorable imitations of Plaintiff's Trade-mark, Registration No. 377,752, in connection with the [149] sale, offering for sale, and advertising of goods in connection with which such use is likely to cause confusion or mistake or to deceive purchasers as to the source of origin of such goods. In this regard, the Defendants adopted and used the trade-mark "Wonder Bed" for a lounge or contour bed,

which is adjustable for use as a bed, a lounge, and a reclining chair, and employed the trade-mark "Wonder Bed" in the sale, offering for sale and advertising of their lounge or coutour bed in commerce among the several States. More particularly, the Defendants identified their contour bed or lounge as the "Wonder Bed" in radio commercials, brochures, on truck side advertising, on billboards, and in at least fifteen different publications including the Los Angeles Times, Home Magazine Section, as further identified in Plaintiff's Exhibits 16, 17 and 18. Certain of the publications, including the Los Angeles Times, have wide circulation in a number of states throughout the United States. Further, in connection with the sale of Defendants' contour bed or lounge, Defendants caused a label to be affixed to the goods on which the goods are identified as the "Wonder Bed."

12. The said lounges or contour beds thus sold and distributed by the Defendants are embraced within the product line of goods specified in Plaintiff's Trade-mark Certificate and have substantially the same descriptive properties as Plaintiff's reclining chairs and/or convertible chair beds, and belong to the same Patent Office classification, namely Class 32 (Furniture and Upholstery).

13. Due notice was given to the public by the Plaintiff of the registration of its trade-mark "Wonder Chair" by displaying with the trade-mark as used the words, "Registered U. S. Patent Office," and special notice was given to the Defend-

ants of the infringement of said trade-mark in a letter dated November 3rd, 1954, and addressed to Sleeper Lounge Company, 3279 Wilshire Boulevard, [150] Los Angeles, California; and the Defendants refused to cease using the infringing trade-mark after having acknowledged receipt of said letter.

Conclusions of Law

1. Plaintiff's trade-mark "Wonder Chair" as shown on Registration Certificate No. 377,752, is valid and subsisting, uncancelled and unrevoked, and plaintiff is the owner thereof.

2. Defendants have infringed Plaintiff's valid trade-mark "Wonder Chair" as shown on Registration Certificate No. 377,752.

In accordance with the foregoing Findings and Conclusions, it is ordered, adjudged and decreed:

1. That a permanent injunction be granted against the Defendants from further infringement of the valid trade-mark, "Wonder Chair," owned by Plaintiff.

2. That judgment be allowed the Plaintiff in the sum of one thousand dollars (\$1,000.00) for damages.

3. That the Defendants be ordered to pay attorney's fees to the Plaintiff in the sum of five hundred dollars (\$500.00).

4. That the Defendants be ordered to pay costs of the suit in the amount of \$178.20 to the Plaintiff.

Dated this 26th day of September, 1956.

/s/ THURMOND CLARKE,
United States District Judge.

Approved as to form:

/s/ WILLIAM J. ELLIOTT,
Attorney for Plaintiff.

Affidavit of Service by Mail attached.

Docketed and entered December 10, 1956. [51]

[Endorsed]: Filed September 26, 1956.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that Sleeper Lounge Company, a co-partnership consisting of Charles Kunzelman and James A. Anderson; Charles Kunzelman and James A. Anderson, defendants above named, hereby appeal to the United States Court of Appeals for the Ninth Circuit, from the final judgment entered on this action on the 10th day of December, 1956.

Dated: 9th January, 1957.

LYON & LYON,

By /s/ R. DOUGLAS LYON,
Attorneys for Defendants.

Affidavit of Service by Mail attached.

[Endorsed]: Filed January 9, 1957. [153]

In the United States District Court, Southern
District of California, Central Division

No. 17779-TC Civil

BELL MANUFACTURING COMPANY, a Cor-
poration,

Plaintiff,

vs.

SLEEPER LOUNGE COMPANY, a Co-Partner-
ship, Consisting of Charles Kunzelman and
James A. Anderson), CHARLES KUNZEL-
MAN and JAMES A. ANDERSON,

Defendants.

Honorable Thurmond Clarke, Judge, presiding.

REPORTER'S PARTIAL TRANSCRIPT
OF PROCEEDINGS

January 25 and 26, 1956

Appearances:

For Plaintiff:

ADELBERT SCHAPP, ESQ.,
ELLIOTT & PASTORIZA, By
WILLIAM J. ELLIOTT, ESQ.

For Defendants:

LYON & LYON, By
ROBERT DOUGLAS LYON, ESQ.

Wednesday, January 25, 1956, 2 P.M.

WILLIAM F. BROWN

called as a witness on behalf of the plaintiff, being first duly sworn, was examined and testified as follows:

The Clerk: State your name, please.

The Witness: William F. Brown.

Direct Examination

By Mr. Elliott:

Q. Will you kindly state your full name?

A. William F. Brown.

Q. What is your address?

A. My business address?

Q. Both addresses.

A. My home address is 6048 Jumilla Avenue, Woodland Hills.

My business address is University of California at Los Angeles, School of Business Administration.

Q. Will you kindly state what position you hold at the University of California?

A. I am associate professor of marketing.

Q. Will you kindly state your educational background and degrees you have received? [3*]

A. I received the degrees of A.B. and M.A. in economics and business at the University of California at Los Angeles, and the doctor of philosophy degree in commerce at Northwestern University.

*Page numbering appearing at top of page of original Reporter's Transcript of Record.

(Testimony of William F. Brown.)

Q. When did you receive the doctor of philosophy degree in commerce—what year?

A. 1941.

Q. And what have you been doing since that year?

A. Teaching marketing and advertising at the University of California and at Northwestern.

Q. How many classes in advertising do you teach at the University of California?

A. Well, I usually have one class in advertising each semester.

Q. What is that class called?

A. Advertising Policies or Advanced Advertising.

Q. Have you ever written any articles which in any way are connected with advertising?

A. I have written articles on the Federal Trade Commission Act and false advertising, on the selection of brands, the factors influencing selection of brands by consumers.

I have done field research work on consumer motivation.

Q. Have you ever had any contact, prior to the past couple of weeks, with either Bell Manufacturing Company or Sleeper Lounge Company, or their personnel? [4]

A. No, not that I know of.

Mr. Elliott: Your Honor, we would like to qualify Dr. Brown as an expert witness in advertising.

The Court: Yes, all right.

Q. (By Mr. Elliott): Dr. Brown, will you kindly state what you believe to be the function of

(Testimony of William F. Brown.)

a trade-mark or, as the public has called them, brand names?

Mr. Lyon: Just a moment, your Honor. At this time I would like to object. I finally get the gist of what he is going to testify to.

Earlier this year I directed the following interrogatory to the plaintiffs:

Give the name and address of each witness who will be called upon to establish the existence of confusion in the trade as a result of the defendant's use of the phrase "The Wonder Bed."

The answer to that was: "Mr. Harold J. Miller."

Evidently they have since changed their mind, but they haven't notified me or made an effort to amend what they told me they were going to rely upon.

If I had known a witness of this type was going to be put on the stand, I would probably have wanted to take his deposition and have been at least in a position to obtain an expert witness of my own.

The Court: Well, we will give you time on that, if you [5] need it.

I will overrule the objection. If you need to do that, I will permit that.

Mr. Lyon: Thank you, sir.

The Court: No reflection on the witness on the stand, but when one side gets an expert, you know, usually the other side can get one, too, on short notice. I mean, I am not placing him in the hand-writing class.

(Testimony of William F. Brown.)

Mr. Elliott: To repeat the question:

Q. Dr. Brown, from your knowledge of advertising and marketing, can you give us an idea of what you consider the function of the trade-mark or what as sometimes been referred to as a brand name?

A. From the point of view of the consumer, I think it is simply the means by which the consumer identifies or associates all the ideas that he gets about a particular manufacturer's product. It is a device through which he associates those ideas. Those ideas may come from advertising, from what people say, from what he learns from his own experience, from dealers telling him—any ideas that he develops about the products of a particular manufacturer are associated, I think, through a brand name, usually also a trade-mark.

Q. What is the method employed by manufacturers or corporations or companies to bring their trade-mark or brand [6] name to the attention of the public?

A. I suppose the most prominent method is the advertising in a variety of forms.

Q. If you were hired as a consultant to a company in connection with a product and you were told to advise them with respect to the layout of advertising, for example, in a newspaper, and further with respect to giving prominence to a trade-mark, what elements would you suggest that they consider to bring that trade-mark to the attention of the public—physical elements?

(Testimony of William F. Brown.)

A. In the particular ad?

Q. That is right.

A. The placing of the trade-mark in the ad, the size of the mark itself—that is, the name or the device, whatever it may be; what may be called the intensity either by the use of color blackness, as the case may be, to focus attention of the reader to the trade-mark; the position with respect to other information in the ad. We use terms called “motion” or “movement” at times. These are technical terms which refer to the device in an ad which may cause the reader to look in a particular direction in the ad. All those, at least, might be used.

Q. Would you say, then, that distinctive type would be such a device to focus attention?

A. Yes, that might be one. [7]

Q. Would you say reverse blocking would be such a device?

A. Yes, I think it is fairly commonly used.

Q. Would you say that framing a word or combination of words that is used as a trade-mark might be a way of focusing attention?

A. It is sometimes used.

Q. I show you an enlarged photostat of an advertisement put out by the Sleeper Lounge Company.

Mr. Elliott: I would like to identify this.

The Court: All right. That will be the next exhibit.

The Clerk: Plaintiff's Exhibit 16 for identification.

(Testimony of William F. Brown.)

Mr. Elliott: Yes, for identification. I think we might as well include it in the evidence.

Will you stipulate to this exhibit?

Mr. Lyon: I have no objection to its going in.

The Clerk: Exhibit 16.

(The document referred to, marked Plaintiff's Exhibit No. 16, was received in evidence.)

Q. (By Mr. Elliott): Again I show you an enlarged photostat of an advertisement, Plaintiff's Exhibit 16, which has been introduced in evidence. Will you tell me, Dr. Brown, when you first saw this advertisement? A. When you——

Q. Or a copy of it in smaller dimensions? [8]

A. When you placed it in front of me when you first visited my office, I think, about a week ago.

Q. Did you have any knowledge at that time with respect to the issues of this case?

A. Not specifically; only that it had something to do with identification.

Q. Will you tell me what your first question was at the time you saw this advertisement or the copy, the smaller copy, to me?

A. I asked you whether the identifying name was a "Sleeper Lounge" or a "Wonder Bed."

Q. Would you say that any words or combinations of words are given particular attention in this advertisement?

Mr. Lyon: Pardon me. I would like to object to the question. An expert can testify, he can give opinions, but he cannot, I do not believe, give opin-

(Testimony of William F. Brown.)

ions on the very ultimate issue that the court is to decide.

The Court: I will overrule the objection. I think he can answer that question all right.

Do you want the question repeated?

Maybe you had better repeat it.

Q. (By Mr. Elliott): Would you say that any words or combinations of words are given any particular attention in this advertisement?

A. Well, the words "Sleeper Lounge," and with the [9] "Company" attached, and "Wonder Bed," and somewhat less attention to "The Bed of Tomorrow" and "For Their Comfort Today!" But primary attention, I would say, or emphasis is given to "Sleeper Lounge" and then "Wonder Bed."

Q. For what reasons do you base your opinion that "Wonder Bed" is given particular attention?

A. The fact that it is in a heavy reverse plate, that is, black background with a light print, with white outlined printing—type.

Q. Are there any other reasons?

A. The fact that it is at the upper left-hand corner, at the obvious entry point, along with "Sleeper Lounge" in what could be called the typical headline position.

Q. Would you say that these factors are factors which are commonly used in connection with advertisements, with particular reference to trade-marks?

Mr. Lyon: I am afraid I don't understand the question.

Will you repeat the question, please?

(Testimony of William F. Brown.)

(The reporter read the pending question.)

The Witness: I would say that would be true of the brand name more than the trade-mark. The mark might be there or, evenly more commonly, I think, at the lower right-hand side of the page. But it sometimes appears in the headline, in the trade name, the identification device, almost always or very frequently at the top. [10]

Q. (By Mr. Elliott): Would you say that Sleeper Lounge Company has used the words "Wonder Bed" in this copy of the advertisement, Plaintiff's Exhibit 16, in a descriptive manner?

Mr. Lyon: Your Honor, I object to that. That is what this court is called upon to decide. That is one of the ultimate issues the court is to determine.

The Court: No, I will overrule the objection. I will let him answer that question.

The Witness: If I were talking about this ad alone, I would say that it would be impossible to tell, because they might have, just as they used the phrase "The Bed of Tomorrow," used "Wonder Bed" in a purely descriptive sense, except that it—well, I know from my own fieldwork in this that it stands out, the association stands out much more clearly in the minds of consumers on this point. So that, coupled with the reverse plate, I think that there is—and my own reaction when you first questioned me, I would say that certainly I would doubt that it is used in a purely descriptive sense; about

(Testimony of William F. Brown.)

the same way that "Sleeper" is used in a descriptive sense with "Lounge" there, in a sense.

Q. (By Mr. Elliott): Would you say that the words "Wonder Bed" are used in good faith only to describe to consumers the article involved?

Mr. Lyon: Your Honor, I object to that. This witness may be an expert— [11]

The Court: Yes, I will sustain the objection to that question.

Q. (By Mr. Elliott): If you were hired as a consultant to lay out the advertisement in connection with this product and you intended to use the words "wonder bed" to describe the product, would you include them in the layout as they are included here?

A. I wonder if that question could be expanded a little bit? What would I have been told about the purpose of the ad and what ideas I was to get across? I couldn't answer that without knowing something of the background of instructions that had been given in such a situation.

Mr. Lyon: Could the witness be instructed to answer the question, your Honor?

The Court: Well, he said he couldn't answer the question.

Mr. Lyon: I wish he would confine his answer to "I cannot answer."

The Court: Well, he didn't answer the question.

Mr. Lyon: I would like to move to strike that portion.

(Testimony of William F. Brown.)

The Court: All right, that may go out, then, as not being an answer.

Q. (By Mr. Elliott): Would you say that the words "Patents Pending" used in this portion of the reverse block have any significance relative to the words "Wonder Bed" from [12] the consumer's standpoint?

A. Well, the fact that they are also in a reverse plate, almost a banner effect—they are tied together—I think that probably they give a degree of official adoption, an official application for adoption, that might be confusing, I think, to a consumer. That is, they would—the term "Patents Pending" coupled with "Wonder Bed" implies, I think, that the name "Wonder Bed" has an official relationship to the product.

(Mr. Elliott showing document to Mr. Lyon.)

Mr. Elliott: I have another enlarged photostat, your Honor—

The Court: Do you want to mark that?

Mr. Elliott: Yes, and introduce it in evidence.

The Clerk: Plaintiff's Exhibit 17.

(The document referred to, marked Plaintiff's Exhibit No. 17, was received in evidence.)

Q. (By Mr. Elliott): Dr. Brown, I show you another enlarged photostat of an advertisement. Will you tell me whether or not you have ever seen this ad? A. No. I think not.

Q. Would you say that any words or combinations of words are given particular attention in this advertisement?

(Testimony of William F. Brown.)

A. Again, "Sleeper Lounge The Wonder Bed" and then "Sleeper Lounge Company," all are given, I would say, [13] prominent attention.

Q. Will you kindly state your reasons for saying that "Wonder Bed" is given prominent attention?

A. The size of the type and the rather distinctive outlined lettering.

Mr. Elliott: I have another exhibit here, your Honor.

Mr. Lyon: May I see that exhibit?

(Mr. Elliott showing document to Mr. Lyon.)

Mr. Elliott: I would like to introduce this exhibit in evidence.

The Court: All right.

The Clerk: Plaintiff's Exhibit 18.

(The document referred to, marked Plaintiff's Exhibit No. 18, was received in evidence.)

Q. (By Mr. Elliott): Dr. Brown, I show you Plaintiff's Exhibit 18, which is an enlarged photostat of an advertisement from a newspaper by Sleeper Lounge Company. Will you kindly state whether or not any words or combination of words are given prominent attention in this advertisement, and, if so, what are the words?

A. Well, right at the very top of the page, the headline, what we might call a headline, "if You really care this year Santa can bring"—and then—"Sleeper Lounge The Wonder Bed." And then again at the bottom of the page, "Sleeper Lounge Co." [14]

(Testimony of William F. Brown.)

Q. How would you say the words, "if You really care this year Santa can bring," are used, or what name are they given in advertising?

A. I think in this instance they would be called the headline. Rather clearly, it is the method used by the person who prepared the ad to attract attention, to get interest in the ad on the part of the consumer or the reader.

Q. Do those words, "if You really care this year Santa can bring"—are they meant to identify or to describe the product? A. No.

Q. What words do you consider in this ad are used to identify the product?

A. "Sleeper Lounge The Wonder Bed."

Q. Why do you say that those are the words? What are your reasons?

A. Well, again, because they have been coupled with the pictured sign, the size of the type, the distinctiveness of the type.

Q. Are the words "The Wonder Bed" in different type than the words "Sleeper Lounge"?

A. Yes.

Q. Are they in different type than any of the other type throughout the ad?

Mr. Lyon: Your Honor, I think the ad speaks for itself [15] as to what it shows. I don't see any purpose to be gained.

The Court: Yes, I will sustain the objection. I think he has testified sufficiently.

Mr. Lyon: Fine.

The Court: We might pause for a short recess.

Mr. Lyon: All right.

(Testimony of William F. Brown.)

(A recess.)

The Court: All right, have the witness resume the stand again.

Mr. Lyon: Would you be kind enough to read the last question, please?

(The reporter read the latter part of the record as follows:

“Q. Are the words ‘The Wonder Bed’ in different type than the words ‘Sleeper Lounge’?

“A. Yes.

“Q. Are they in different type than any of the other type throughout the ad?”)

Mr. Lyon: I object to that line of inquiry. The ad speaks for itself. It is obvious from the ad that it is in different types. I don’t see where the gentleman’s testimony is going to——

The Court: I will overrule the objection. I will let him answer.

You may answer. [16]

Mr. Elliott: I believe we were talking about Exhibit 17. Is that right?

Mr. Lyon: Exhibit 18, counsel.

Mr. Elliott: Exhibit 18 (showing exhibit to the witness).

The Witness: Yes, it is in different type.

Q. (By Mr. Elliott): In your earlier testimony, Dr. Brown, I believe you stated that conceivably the words “Wonder Bed” in this particular advertisement could be interpreted as being used possibly in a descriptive sense. On the basis, now, of the three advertisements you have now seen, as

(Testimony of William F. Brown.)

Plaintiff's Exhibits 16, 17 and 18, would you say that the words "Wonder Bed" are being used in a descriptive sense?

Mr. Lyon: Your Honor, I object to that as calling for the witness' opinion on something that the court is going to be required to decide, and as going beyond the proper scope of the interrogation of an expert witness.

The Court: No, I will overrule the objection. You may answer.

The Witness : Well, I think, rather obviously, there has been a tieup here between the name "Sleeper Lounge" and the "Wonder Bed" continuously throughout the ad, throughout the series of ads, and it has lost the descriptive value of the word "wonder," if there is any—has merged, I think, into simply an identifying device.

Q. (By Mr. Elliott): In forming an opinion as to the [17] manner in which the words "Wonder Bed" have been used by the Sleeper Lounge Company in Exhibit 16—

Do you see that (showing document to the witness)?

A. Yes.

Q. —and Exhibit 18 (showing document to the witness), did you buttress your opinion in any way by further research?

A. Well, I conducted—

Q. Or fieldwork into the subject?

A. I conducted an informal field study, in which we interviewed consumers, showing them the paired ads, and attempting, as accurately as we could, to

get at the effect on them of the ads, that is, in terms (Testimony of William F. Brown.)

of their reaction or their—the result of the ads in terms of associating the product and the names that were used or the terms that were used in the ads.

Q. Was any other piece of material used besides the ads? A. Questionnaires and a little card.

Q. Any other advertising matter?

A. On some of the test ads, we used the colored photograph of the billboard, on just a few.

Q. Is this the photograph, Plaintiff's Exhibit 15, to which you refer?

A. Yes, I think it was mounted, but it is approximately that same—a photograph of what appears to be the [18] same billboard.

Q. Will you explain to us how the survey was conducted, in your own words, please?

A. I began by making a rough field study myself. I shouldn't say "study," because that is what I call a preliminary or informal investigation, taking alternative questionnaires or questions and asking a few consumers in the area near the university to answer those questions, in order to develop an idea as to what questions were most valid, what the ideas of the consumers in a lengthy interview might be.

Then I worked out the revised and final form of the questionnaire and employed three of my students to conduct interviews, using that questionnaire, in the Santa Monica area, on a sample basis, which I can go into in detail, if you want. The reason behind it——

(Testimony of William F. Brown.)

The Court: I think that is a matter of cross-examination.

The Witness: Actually, the purpose of the study was, primarily, simply to reinforce my own ideas about the advertisements at issue, that is, what the effect on the consumer would be.

I think, when you first called me on the telephone about the whole matter, some eight or ten days ago, I gave you my opinion that it is very difficult for anyone, on any particular matter, to speak from—well, to use what I call [19] armchair reasoning and say very authoritatively just what a million consumers will think about a particular subject, even with a great deal of experience. I think the history of even the greatest men in the field of advertising and marketing indicates that they don't always guess right, and I always prefer to buttress my own thinking on the matter with a check in the field, and that is the prime purpose of the checking I did and had the students do for me.

Q. (By Mr. Elliott): As a result of this survey, would you say that your opinions were confirmed with respect to the manner in which "Wonder Bed" is used in the advertisements and with respect to the effect that such use would have on consumers?

Mr. Lyon: Your Honor, I will object to the question. There has been no testimony, that I know of, that has shown any effect on a consumer. However, even more so, this is a survey that was not run by the doctor. It was run by students of his who are not present for cross-examination. For all I

(Testimony of William F. Brown.)

know, they took the doctor's instructions, went out and filled them out themselves. I have no opportunity to check into what these students did, who they questioned on the questionnaire, the reasons for the answers given on the questionnaire; it is all hearsay, and hearsay compounded before it gets to the doctor. Now he has asked his opinion on it. [20]

The Court: I will overrule the objection. I think it goes to credibility.

You may answer.

Mr. Elliott: Would you read the question, please?

(The reporter read the pending question as follows: "Q. As a result of this survey, would you say that your opinions were confirmed with respect to the manner in which 'Wonder Bed' is used in the advertisements and with respect to the effect that such use would have on consumers?")

The Witness: As I think I said right at the start, I feel that after looking at a few of the ads that the term "Wonder Bed" would probably be in the mind of many, not all by any means, but at least a reasonably sizable proportion—I would hesitate to venture a percentage; it might be 25, it might be 50, it might be 75; and I still wouldn't, because the sample that we chose was not a valid sample in the sense that it covered all of Southern California, and was not intended to do that. The only purpose of the study was to reassure me that when I made a

(Testimony of William F. Brown.)

judgment with respect to the two ads and said, the way the term "Wonder Bed" is used here, there is a good likelihood that at least a sizable number of consumers will think of this product as the Wonder Bed just as I think of an automobile as a Ford automobile, or something of the sort. [21]

Well, that was my feeling at the start, and after conducting the study I still feel, in fact, I am positive now, that a sizable number of customers will identify this particular product as the Wonder Bed. I don't think it necessarily will be the majority—in fact, I doubt it.

Mr. Elliott: That is all the questions, your Honor.

The Court: You may cross-examine, Mr. Lyon.

Cross-Examination

By Mr. Lyon:

Q. Doctor, in the course of advertising, in your experience, is it common practice for a concern to settle on particular ad and retain it?

A. Not very often. It is sometimes done.

Q. The usual practice, then, is for the concern in question to select one format for advertising and then change to another and change to another and change to another, over the course of time?

A. No——

Q. Maybe retaining the dominant features, but changing the format of the ad?

A. It depends on what you mean by "format."

(Testimony of William F. Brown.)

You said first one advertisement, and now you are using the term "format." Actually, it is very common, I think, for firms, for a particular season and sometimes for a long period, to [22] use a certain format, but then to change the details. I think now, for example, of the Cadillac series of advertisements, which I think are pretty well known; the format was about the same for, oh, a couple of years. De Beers' diamond campaign is another one.

Q. Then it would be a recognized custom in the advertising field for a person to make an ad using their trade name, using certain descriptive material underneath that, and then subsequently changing the descriptive material, retaining their trade-mark, and substituting different descriptive material for it? A. Yes, that is frequently done.

Q. That is frequently done, is it not? As a matter of fact, that is almost a custom in the industry or in your field?

A. Well, I don't think I would say that it is a custom, exactly. It is sometimes done. It sometimes isn't.

Q. What is the purpose of making such a shift?

A. A shift in descriptive material, you mean?

Q. Yes, sir.

A. Usually to get new ideas across to the consumers.

Q. Across to the purchasing public?

A. And also, I think, to avoid the difficulty which may arise if the consumer sees the same ad over and over again; you get resistance simply be-

(Testimony of William F. Brown.)

cause it is the same ad. [23] If the same consumer sees the same picture, he says, "Well, I have seen it. There is no point in reading it."

Q. So such a change would be made for at least two purposes, and possibly for others; one would be to avoid the ad becoming stale in the mind of the consumer, and, second, to emphasize new features of your device; is that correct?

A. Or new ideas about it.

Q. Or new ideas about it?

A. A host of new ideas might come in there.

Q. I believe you have testified that a trade name—I don't like that terminology; I like the terminology "trade-mark." Do the two mean the same, in your mind?

A. Almost, because, I think, primarily, not from the legal point of view but from the point of view of the consumer—and I think of one as identifying the product in the mind of the consumer, the product of a particular manufacturer.

Q. Which would you designate that?

A. Both.

Q. Well, there is a legal distinction, sir. I realize you are not a lawyer, so that you wouldn't know, but in the California Code there is a definite distinction between "trade-mark" and "trade name," and I use the term "trade-mark" because I think that is what you have been referring to.

You have defined such a device as a device by which [24] people associate their knowledge of a particular product with a particular individual or

(Testimony of William F. Brown.)

a particular concern. In other words, a trade-mark serves the office of designating the origin of a product; is that correct? A. Yes.

Q. May I show you this Exhibit 16 and ask you what trade-mark is used there?

A. My question was—I think I answered that, in a sense, by asking my very first question from Mr. Elliott; I asked him, “Which of these is the trade-mark?” That was the question I asked him.

Q. In other words, you can’t tell, from looking at this, what the trade-mark is or what it is not?

A. No.

(Mr. Lyon showing document to Mr. Elliott.)

Q. (By Mr. Lyon): May I show you this advertisement and ask you what the trade-mark is in this ad?

I would like to identify this as Defendants’ Exhibit A, your Honor.

The Court: Defendants’ Exhibit A.

(The document referred to was marked Defendants’ Exhibit A for identification.)

The Witness: My reaction would be, “The Electromatic ‘Sleeper Lounge’ Bed.”

Q. (By Mr. Lyon): That is your opinion with respect to [25] this particular ad. Now, may I show you again Plaintiff’s Exhibit 16?

Mr. Lyon: I would like to offer in evidence Defendants’ Exhibit A, your Honor.

The Court: It may be received.

(Testimony of William F. Brown.)

(The document referred to, marked Defendants' Exhibit A, was received in evidence.)

Q. (By Mr. Lyon): I would like to show you Defendants' Exhibit A and Plaintiff's Exhibit 16 and ask how you can identify in one the trade-mark and in the other you cannot. I point out now that Plaintiff's Exhibit 16 contains "Sleeper Lounge the Wonder Bed" in one instance, and in the next ad it says "The Electromatic 'Sleeper Lounge' Bed." Is there something different in those ads?

A. Yes, I think there is. Here, "The Electromatic 'Sleeper Lounge' Bed Banishes Tension and Nervous Exhaustion" is a fairly complete phrase. The same is true here. In other words, under no possible interpretation is this a trade name or trade-mark. Nor is this (indicating). Nor is any other phrase or group of words.

Here there are two or three—that is, "Sleeper Lounge" here, "The Wonder Bed," and "Sleeper Lounge" here, that might be logically considered to be the trade name.

Q. What are the two or three alternatives, looking at this ad, what might be considered the trade name? [26]

A. "Sleeper Lounge" or "Wonder Bed."

Q. You would say these two could be separated, or is it "Sleeper Lounge" as one or "Sleeper Lounge the Wonder Bed" as the alternative?

A. I think it could be either one, separately or together.

(Testimony of William F. Brown.)

Q. Or combined? A. Yes.

Q. But in this instance it is only this one?

A. Well, it could be “‘Sleeper Lounge’ Bed” or “The Electromatic ‘Sleeper Lounge’ Bed.”

Q. I fail to see the distinction, Doctor, and I wonder if you could help me?

A. Again, when you say “trade-mark,” I am thinking of trade name in the consumer’s mind.

Q. You are talking now in the sense that the person—suppose Joe Doaks had bought one of these, and his brother wanted to get one, what would he ask for?

A. That is right. As a matter of fact, you just about took the question I used on my questionnaire and asked the respondents that same question. And I could say that in about—

Q. Well, I am not interested in that, Doctor, so we won’t go into that.

I am just asking how you can tell the difference between [27] the manner in which this is used and the manner in which this is used, as to why one is the trade-mark and the other isn’t.

A. The chief difference is by a process of elimination, as I indicated here. This is the only thing that might be used in that ad as an identifying device, I think (indicating). Here there are two (indicating). And I think—

Q. Taking an over-all look at that, what is the trade-mark? Or can’t you tell?

A. Well, there is a confusing element here. Sometimes the trade-mark is the same as the company name, and sometimes it is different. That is

(Testimony of William F. Brown.)

the reason why I was not sure, when I first looked at it. For example, we have Chrysler automobiles, and——

Q. All right. You have the Chrysler Imperial. Let me ask you what the trade-mark is on that particular item. Is it "Imperial"?

A. I don't know, frankly. I understand they are beginning now to set it up as a separate brand name.

Q. By taking the word "Chrysler" off?

A. By taking the word "Chrysler" off.

Q. But when they put "Chrysler" and "Imperial" below it, the trade-mark is still "Chrysler," is it not?

A. Well, a person identifies it by—I would say in that case, if it is "Chrysler Imperial," he identifies it as [28] "Chrysler Imperial" as distinct from——

Q. "Chrysler" or another "Imperial"?

A. ——from some other "Chrysler" or another "Imperial."

Q. Is there any difference in "Sleeper Lounge the Wonder Bed"?

A. Very little difference there, I think—very little.

Q. So that if it is a trade-mark, the best you can say is that it is "Sleeper Lounge the Wonder Bed"? If it's a trade-mark at all. Now, this might be the trade-mark down here (indicating)?

A. That is right, it could be.

I see what you mean. Well, when I answered be-

(Testimony of William F. Brown.)

fore about "Imperial," if they separate it, they might use "Imperial" as the identifying device. And I don't know, frankly.

Q. You can't tell, then, normally, from looking at a document, what the identifying device is, or not, unless it is an obvious case; is that correct?

A. Well, let me put it this way. I couldn't tell for sure, in a situation of this sort, which one would be used by the company as its identifying device, the first time I had seen it. That is true.

Q. But you can from this Defendants' Exhibit A?

A. Well, I was fairly positive there, because by a process of elimination there seemed to be no other logical alternative. [29]

Q. I show you now a label, Doctor, and ask you if you can identify the trade-mark on that label?

A. Well, after our preliminary discussion, I know what it is. But again I would have to go back to my first question by Mr. Elliott, which I would say would be the name that identifies the product. Here, I would say probably that, since it is on the label, both names are used, that both of them constitute the trade-mark.

Q. By "both of them," you mean what?

A. "Sleeper Lounge the Wonder Bed."

Q. How about the two or three descriptive phrases below, then, which are set out in large type?

A. You mean the small type, do you not?

Q. Well, they are in large type. Then the other descriptive matter, although not as large as "Sleeper Lounge," which is the largest, "The Won-

(Testimony of William F. Brown.)

der Bed” next: How about “The Bed of Tomorrow” and “For Your Comfort Today”; can those be the type device to which you are referring? They are featured and prominent.

A. Well, I would think not, in this instance, for at least two or three reasons. One, the type is so small; it is almost the smallest in the ad. The phrases themselves, “The Bed of Tomorrow”—well, it is a sentence almost, there, an incomplete one—“The Bed of Tomorrow for Your Comfort Today.” [30]

Q. Let’s start with the sentence one line higher; doesn’t that follow just as well?

A. Yes, I think, in a sense, that is true. In fact, you could start at the top.

Q. Start at the top? A. Yes.

Q. But if there is a designating mark on this label, it is either “Sleeper Lounge” or “Sleeper Loung the Wonder Bed”; is that correct?

A. I think so.

Q. I call your attention to Plaintiff’s Exhibit 8 and ask you what the trade-mark is that is used in that advertisement.

Mr. Lyon: Incidentally, I would like to offer this as Defendants’ Exhibit B.

The Court: Defendants’ Exhibit B.

(The label referred to, marked Defendants’ Exhibit B, was received in evidence.)

Q. (By Mr. Lyon): What is the identifying mark or trade-mark in that Exhibit 8, sir?

(Testimony of William F. Brown.)

A. I would say "Bell."

Q. "Bell" is? A. But——

Q. There is a possibility of it being "Bell's Wonder Chair," isn't there? [31]

A. That is right.

Q. At least "Bell" is a part of the trade-mark?

A. Again, the identifying factor in the consumer's mind—I don't want to use the term "trade-mark" in the technical legal sense, but——

Q. When you state in this ad that the identifying device is "Bell's," do you mean that in the same sense that you suggest that either "Sleeper Lounge" or "Sleeper Lounge the Wonder Bed" or "The Wonder Bed" were identifying devices in the defendant's ads? A. I think so.

Q. I show you now Plaintiff's Exhibit 7 and ask you again what the trade-mark or identifying device is that is illustrated in that ad?

A. Well, this—and perhaps I didn't see that under the label up above—but here there is a distinction in the sense that "Bell's Float-Rest Chair," "Bell's Wonder Chair," sets up some distinction in somewhat the same fashion that——

Q. Well, that would tend more to emphasize the word "Bell," wouldn't it? That would tend more to emphasize "Bell" as the identifying feature?

A. Well, more as the manufacturer.

Q. We agreed before, didn't we, that a trade name or device was something that identified the manufacturer? A. Source. [32]

Q. Source of origin?

(Testimony of William F. Brown.)

A. Somewhat—for example, this might be the “Chrysler Imperial,” this is the “Chrysler New Yorker,” this the “Chrysler Imperial,” this the “Chrysler New Yorker.”

Q. So in each of these instances the identifying mark is “Bell”?

A. It is the device which most clearly associates the—identifies the source of the item.

Q. I show you now Plaintiff’s Exhibit 6 and ask you the same question: What is the trade-mark or identifying device used there?

A. Is this for the entire—you see, again I am confused a little bit by the fact that there are several different products in the one here. The association with the entire ad or with an individual product?

Q. I will ask you the question both ways.

A. Unquestionably, the products as a line are associated with the name “Bell”; individual items are associated with the particular—

Q. Particular subdescription and subtitle?

A. —particular subdescription and subtitle.

Q. May I ask you, would you consider those the same as grade names? In other words, if you said “grade A” and “grade B,” isn’t that the same type of description as “Bell’s” this chair and “Bell’s” that chair? [33]

A. I would have to look at it a little.

Q. Take all the time you like, Doctor.

A. (A pause.) In this instance, of course, there is a specific caution to the reader that the trade-

(Testimony of William F. Brown.)

mark is "Wonder Chair." If that were not there, I would——

Q. Where do you find that, please?

A. (Indicating on document.)

Q. Yes. If that were not there, what would you think it would be?

A. The consumer, I think, would come away from the ad with the idea that Bell produces two kinds of products: One is a "wonder-chair" and one is a "chair bed."

Q. Thank you, sir. I show you now Plaintiff's Exhibit 4 and ask you what the trade-mark or identifying device in that ad is?

A. (A pause.) It would be "Bell's Wonder Chair" and possibly "Bell Slumber-Nest Sofa."

Q. I show you Plaintiff's Exhibit 5 and ask you again what the trade-mark or identifying device is on that piece of literature?

A. It is the same, that is, the identification from the consumer's point of view, would be "Bell's Wonder Chair."

Q. So your testimony with respect to each one of these is that the trade-mark used is "Bell's Wonder Chair"; is that correct, Doctor? [34]

A. That is right.

Q. In no instance is the trade-mark "Wonder Chair"? A. Pardon me?

Q. In no instance is the trade-mark "Wonder Chair"? It is always "Bell's Wonder Chair"?

A. I think the consumer would identify it in that way.

(Testimony of William F. Brown.)

Q. That is correct. Now, may I show you——

A. May I——

Q. ——Plaintiff's Exhibit 15 and ask you what the identifying mark is—pardon me, sir—I ask you what the identifying mark is in that photograph?

A. The identifying mark?

Q. The identifying device or trade-mark which is illustrated on that billboard.

A. "Sleeper Lounge" or "The Wonder Bed."

Q. Now, I notice in each instance on the plaintiff's advertisements that where the word "Bell" was superimposed above "Wonder Chair" you came to the conclusion that the trade-mark used was "Bell's Wonder Chair," and whenever I show you one of defendant's ads wherein the words "Sleeper Lounge" are exhibited above the words "The Wonder Bed," you come to the conclusion that the trade-mark is either "Sleeper Lounge" or "The Wonder Bed," and I would like to hear your distinction between the two?

A. There is none in the sense in which I made the [35] statement before. I think the consumer would identify, in each instance, the product by either or possibly both those terms, paired terms. In other words, I would expect some consumers to go into a store and ask for "Bell's Chair," and others to go into a store and ask for "Bell's Wonder Chair," and others to go in and ask for the product "Wonder Chair," and I think the same is true here; some consumers will look at the manufacturer's name and place more emphasis on that,

(Testimony of William F. Brown.)

some on the term "Wonder Chair" or "Wonder Bed," and some will group the two.

Q. That is all your opinion, of course?

A. Oh, yes, except——

Q. May I ask, are you being compensated for your services in this case? A. Yes.

Q. And how long have you been compensated?

A. Well, I am—the compensation is based——

Q. On the amount of time you spent?

A. On the amount of time I spent in working on the particular project.

Q. How much time have you worked on the project?

A. Oh, approximately two days, I suppose; scattered series of hours, scattered over a week's time.

Q. Most of that work has been marshalling the questionnaires which your students have provided you with? [36] A. Primarily.

Q. How much time did you spend studying the ads, for example?

A. Oh, I would say probably two hours, three hours; perhaps less, perhaps more.

Q. Doctor, have you ever been employed other than as an instructor at the University of California at Los Angeles and at Northwestern?

A. Well, I have done consulting work, if that——

Q. Expert witness work?

A. I have been in that occasionally.

Q. And you have done consulting work; is that what you mean by "consulting work"?

(Testimony of William F. Brown.)

A. No; I have done other consulting work, too.

Q. Consulting work on what, sir?

A. Almost invariably on consumer field studies.

For example, I have worked in connection with pay-as-you-go television in one study, for example. And a corporation was interested in——

Q. A television corporation?

A. The Telemeter Corporation, that is right. In a few other instances of similar sort: Ronson Lighter Company, in a particular case, and so on—Ronson Lighter Metal Works.

Q. I call your attention again, Doctor, to Plaintiff's [37] Exhibit 16, and I call your attention to the words "Patents Pending" off in the upper right-hand corner. As I recall your direct examination on this point, you said that those words would be confusing in the mind of a reader of this ad and would lend some officiality of some kind to the words "Wonder Bed"; is that paraphrasing your testimony accurately? A. I think so.

Q. Would you explain what you meant by that, sir?

A. Simply that the fact that the words "Patents Pending" are imposed on a black background—they are white on a black background, the phrase "Wonder Bed" is white on a black background; the black, almost ribbon-like strip there, tends to tie the two together.

Q. What is the result of tying the two together?

A. From the respondent's—the consumers, in other words, may look at the phrase and feel that the fact that "Patents Pending" is added or coupled

(Testimony of William F. Brown.)

with "Wonder Bed" to indicate that either the "Wonder Bed" is patented or that there is some official designation of the term "Wonder Bed"; in other words, "Patents Pending," meaning, in effect, that "Wonder Bed" is a patented product. In fact, some of them said that in the survey.

Q. Pardon me?

A. We had one or two mention that specific point in the survey. A couple of the respondents mentioned that point. [38]

Q. In this survey that you conducted, Doctor, you used three of your students to conduct the survey for you; you did not personally question anybody?

A. No. As I thought I made clear, I did. As a matter of fact—

Q. Preliminarily, before you made out your questionnaire; then you ran your survey, and you did nothing further from then?

A. No; I used that questionnaire and did some questioning with that questionnaire.

Q. Yourself?

A. Yes. It was only a couple, though.

Q. Whom did you question?

A. Well, I have the address of the person here. I have forgotten her name. I make it a practice usually of going in Westwood. I drove down one of the streets, stopped at a corner, went up, pushed the doorbell. In that case, no one was home. I went next door, and a respondent answered the doorbell and answered my questions.

(Testimony of William F. Brown.)

Q. How long did these students spend in conducting this survey?

A. In total, I imagine only a matter of three or four hours.

Q. How many people did they talk to in the course of three or four hours? [39]

A. Oh, I think we had about 25 or 30.

Q. 25 or 30 would represent the whole questionnaire, the whole survey that you made?

A. That is right.

Q. Doctor, have you ever conducted surveys, market surveys, in trade-mark cases before?

A. Yes.

Q. Have you ever been required or requested—

A. I shouldn't say "Yes" to a trade-mark case. In an unfair competition case.

Q. In an unfair competition case. What were you asked to prove by your survey in that case? Whether or not there was a palming-off or—

A. The question as to whether or not the particular product was being passed off as another, as a well-known brand.

Q. As a well-known product or a well-known brand? A. Well, more specifically—

Q. There are two types: One is where there is confusion between the two names, and one is where the articles are so similar that when people are selling they are selling—

A. It was the article.

Q. It was the article. In other words, they were

(Testimony of William F. Brown.)

simulating somebody else's article, taking it out and selling it? A. That is right. [40]

Q. In such a survey in this unfair competition case, how long did you spend on that survey?

A. I think a matter of about three days.

Q. About three days of your own time?

A. I think so, in directing the survey; spread, again, over a period of perhaps a week or ten days.

Q. I realize that. How many people were interrogated in that survey?

A. Approximately I am speaking from memory now, but I think 350 or 400 in this area and another three or four hundred in the San Francisco Bay area.

Q. Do you think a survey of 25 people in a town with the population of the City of Los Angeles gives you an accurate cross-section of opinion?

A. No, not at all.

Mr. Lyon: No more questions.

The Court: That is all.

Are you through with the professor?

Mr. Elliott: I would like to ask another question, your Honor.

The Court: Certainly.

Redirect Examination

By Mr. Elliott:

Q. Dr. Brown, did I suggest to you that you make the [41] survey? A. No.

Q. Did you suggest that you make the survey?

(Testimony of William F. Brown.)

A. Yes.

Q. What did you suggest as the reason for the survey?

A. I said that I didn't feel that I would be justified in making very flat statements about what people thought——

The Court: He said he wanted the survey to "buttress" his thought. That was the expression he used.

The Witness: Yes, your Honor.

Mr. Elliott: Thank you.

The Witness: And that—pardon me.

The Court: Was that it? That was the expression you used, wasn't it?

The Witness: Yes, your Honor.

The Court: I remembered the expression. It was a new expression. It made an indelible impression upon me. I knew there was such an expression, but I never heard it used that way.

Mr. Elliott: That is all.

The Court: Is that all?

Mr. Lyon: That is all, your Honor.

The Court: We might take a recess at this time. Counsel, you are through with the professor? [42]

Mr. Lyon: Yes, your Honor.

The Court: He may be excused.

In the morning there are always people to see me in these different cases. We will start at a quarter of ten tomorrow morning.

Mr. Elliott: Thank you.

Mr. Lyon: May I inquire, before we recess, whether there will be any further witnesses?

Mr. Elliott: Not as far as we are concerned.

Mr. Lyon: Would it be possible, your Honor, before we take the recess, to tie up the plaintiff's admission—

Mr. Elliott: We have some questions.

Mr. Lyon: Oh, you expect to call the defendant?

Mr. Elliott: Yes.

The Court: Make it a quarter of ten in the morning, then.

(Thereupon, at 4:30 p.m., an adjournment was taken until Thursday, January 26, 1956, at 9:45 a.m.) [43]

Thursday, January 26, 1956—9:45 A.M.

The Clerk: Bell Manufacturing Company vs. Sleeper Lounge, et al., No. 17779-TC Civil.

The Court: Did you want to call the defendant?

Mr. Elliott: Counsel and I stipulate that, in view of the fact that he is going to open up with the defendant on cross-examination—

The Court: You rest, then?

Mr. Elliott: We will rest and we will cross-examine instead.

The Court: Is that satisfactory, Mr. Lyon?

Mr. Lyon: Yes, your Honor.

The Court: All right. The plaintiff rests.

CHARLES KUNZELMAN

one of the defendants, called as a witness on behalf of the defendants, being first duly sworn, testified as follows:

The Clerk: State your full name, please.

The Witness: Charles Kunzelman.

Direct Examination

Mr. Lyon: At this time I would like to offer in evidence as defendants' next in order——

The Clerk: Defendants' C.

Mr. Lyon: ——as Defendants' Exhibit C, pages of the [44] local telephone directories, which have been torn from the full volume, which indicate various concerns in the City of Los Angeles using the word "Wonder" in their trade name.

The Court: All right. Defendants' Exhibit C.

(The documents referred to, marked Defendants' Exhibit C, were received in evidence.)

Mr. Lyon: I would like to offer as defendants' exhibit next in order——

The Clerk: Defendants' D.

Mr. Lyon: ——as Defendants' Exhibit D, this book of registrations of various trade-marks in the United States Patent Office, each of which involves the use of the word "Wonder" on goods in Class 32 in the Patent Office, which is the same class as the registration of the plaintiff, and which goods are identical or related to the goods that the plaintiff has used or purported to use the word "Wonder."

(Testimony of Charles Kunzelman.)

The Clerk: Defendants' Exhibit D.

(The document referred to, marked Defendants' Exhibit D, was received in evidence.)

By Mr. Lyon:

Q. Will you state your name, please, sir?

A. Charles Kunzelman.

Q. Would you generally outline your previous business experience?

A. I have had some connection with the furniture [45] business ever since 1946, after the war. I was, first of all, connected with the Fishman Furniture Manufacturing Company as office manager and assistant to the owner, that manufactured upholstered living room furniture. Later on, I established Civic Center Sales, a retail furniture and appliance business, and later the U. S. Merchandise Company up in San Francisco, a furniture and appliance business. And, in the latter part of '51, Civic Center Sales here locally, which was also a furniture and appliance business, retail.

Q. You are also at the present connected with the defendant, Sleeper Lounge?

A. Yes; I am a partner in that company.

Q. You are the Charles Kunzelman named as a defendant in this action? A. That is right.

Q. In addition to your association with the Sleeper Lounge organization at present, you have also other occupations with these organizations you previously mentioned you are still operating?

(Testimony of Charles Kunzelman.)

A. Yes. I am president of Civic Center Sales, Inc.

Q. So that the Sleeper Lounge represents a sideline in your normal course of business?

A. It has up to now, yes.

Q. A new business you are trying to [46] develop?

A. Yes.

Q. It is not your principal source of income, is it?

A. No.

Q. When was the defendant, Sleeper Lounge, formulated?

A. On or about June, 1953.

Q. Your partner in this business is Mr. Anderson?

A. James A. Anderson.

Q. Is he active in the business?

A. He hasn't been very active ever, and just off and on, to a limited extent.

Q. So that as far as this particular organization is concerned, you are the one who has been managing it?

A. That is right.

Q. How many employees do you have at Sleeper Lounge?

A. One full-time employee, Kay Randall, who is in the office at all times, and then we have other, part-time help on occasion, and that has varied from one to four, depending on the season or our activities.

Q. And what kind of activities would these additional employees—

A. Additional activities, for instance, would be those such as the Home Show. We would show our product there.

(Testimony of Charles Kunzelman.)

Q. That would be demonstrating?

A. Yes. The Cavalcade of Health, recently held here [47] in Los Angeles—

The Court: I can't quite hear you.

The Witness: The Cavalcade of Health, recently held here at the Los Angeles County Fair at Pomona.

Q. (By Mr. Lyon): What do the defendant, Sleeper Lounge's activities consist of? Do they manufacture, sell, use, or what do they do?

A. Well, the Sleeper Lounge Company sells the product. We have, on a contractual basis, the product made for us by Thorpe & Draper, who are primarily mattress manufacturers. They make the product for us on a contractual basis, and we sell it—promote it.

Q. In accordance with your instructions as to size and so forth? A. Yes.

Q. Do you keep any inventory on hand?

A. Just the floor samples that we have of different types of mattresses and sizes. You see, we make these from twin size up to full size, queen size, king size.

Q. In accordance with what the customer requires? A. Yes, that is right.

Q. I will show you at present what appears to be a brochure, and ask you if you can identify that?

A. Yes; that is a brochure that we put out some time in 1954. [48]

Mr. Lyon: May I have this marked as a defendants' exhibit?

(Testimony of Charles Kunzelman.)

The Clerk: Defendants' Exhibit E.

Mr. Lyon: And offer the same in evidence, your Honor.

The Court: It may be received.

(The descriptive folder referred to, marked Defendants' Exhibit E, was received in evidence.)

Q. (By Mr. Lyon): Referring now to Defendants' Exhibit E, would you describe the construction of the product of the Sleeper Lounge Company in detail, both as to how it is made and as to how it operates?

A. Our product is a substitute for a box spring and a mattress. It is a box spring and a mattress, with a mechanism attached to the underside of the box spring, in a box, which box does not show when the bed is made up; and this, as I previously mentioned, we can make this in any bed size: Twin size, full size, queen size, king size, or special sizes. And it can either be on casters, as a Hollywood bed, or it can be put into a regular bedstead, as pictured on this particular brochure, or in front of a headboard. In other words, it can be used any way that a box spring and a mattress can be used. And it is electrically controlled with two motors; one actuates the foot, and one actuates the head. So that a person lying in bed can actuate it and move it into any position he desires. It goes into all of the positions [49] of a hospital bed, and can, therefore, change your bed to a reading position, looking at

(Testimony of Charles Kunzelman.)

television, resting in bed, having the feet up, or anything that you want, for your comfort or for your health.

Q. Does that device described in that brochure, or the device you sell, ever assume the position of a chair? A. No, it does not.

Q. Always a bed? A. It is always a bed.

Q. Is that device ever upholstered?

A. No, sir; it always comes covered with a mattress ticking, the same as any mattress or any bedstead.

Q. So that the manner in which you sell the device, it looks from outward appearances just like a mattress and box spring?

A. Like a mattress and box spring and frame, yes; that is what it looks like.

Q. Is anyone else, to your knowledge, making a device of similar characteristics?

A. No, we were unique. The only thing it could be likened to is a hospital bed, except the hospital bed looks differently, whereas this can be used in the home and looks no different than an ordinary box spring and mattress. But there is nothing of that nature that has ever been on the market before. [50]

Q. To your knowledge?

A. Yes, that is right. This product is unique.

Q. How is this product sold, Mr. Kunzelman?

A. Primarily, we have sold it through our—directly from our location at Wilshire Boulevard. That is, in itself, a step in the process of merchan-

(Testimony of Charles Kunzelman.)

dising it. In other words, outside of the Los Angeles area, we are now starting to sell through stores; but in the Los Angeles area, we still sell it directly ourselves.

Q. How is the normal sale handled? How does it come about, in the first place, and how is it handled within your organization?

A. People hear of it either through friends who have them or through the advertisements which we have published in the newspapers and through other advertising media, or at shows where we have shown it, and then they try it, see it, come down to our store, and usually there is a considerable amount of time involved in a sale, because it is a high-priced item that is not an impulse item. They don't buy it the first time they see it. They think about it a long time. It is a product that looks good to them, but it costs a lot of money, and they take a lot of time, sometimes as much as a year or longer, before they finally buy it.

Q. In other words, a customer with your organization will either phone you or write you a letter or come in the [51] store; I presume those are the only ways they ever contact you. Do you ever make a sale by virtue of somebody walking in the door or writing or just phoning up and saying, "Deliver one of these to me"?

A. There has been one of the early sales that we made, for instance, to Bob Burns, who had been looking for us for months, who had heard of my product and had been wanting something of that

(Testimony of Charles Kunzelman.)

nature, and he called up one day and asked for brochures to be sent him, price list. Then he called back half an hour later, said, "Never mind sending the brochures. Just send the bed. I have been waiting for it long enough. I don't want to wait any longer."

But normally that is a very rare occurrence. Usually they do investigate it to a considerable extent because of the fact that it is a new product; they want to assure themselves it is a good product, that it is something that will hold up, something that will do what they want of it.

Q. Well, to a large extent that is dictated by the price of this item, too; is that correct?

A. That is right.

Q. I show you now what purports to be a price list of your organization and ask if you can identify that?

A. Yes; that is a retail price list.

Q. Is that your current retail price list?

A. That is our current retail price list. Just a [52] moment. Let me see the date on that.

(Mr. Lyon handing the witness a document.)

The Witness: Yes, it is.

Q. (By Mr. Lyon): Your prices have, of course, over the time your organization has existed, changed, have they not?

A. Slightly; not very greatly.

Q. They have tended to go up and down?

A. They have gone up.

Mr. Lyon: May I have that marked as defendants' exhibit next in order, your Honor?

(Testimony of Charles Kunzelman.)

The Clerk: Defendants' F.

Mr. Lyon: I would like to offer it in evidence at this time, your Honor.

The Court: It may be received.

(The document referred to, marked Defendants' Exhibit F, was received in evidence.)

Q. (By Mr. Lyon): I note by this price list, Mr. Kunzelman, that you sell a "3/3 (Twin) Standard Complete With Innerspring Mattress" at \$329.50. Is that the cheapest you will sell one of these devices with a mattress?

A. Yes, that is right.

Q. You also sell them without the mattress; is that correct?

A. Yes, if they have a mattress which can do the work. [53]

Q. Does that require a special type of mattress?

A. In an innerspring, yes. Not very many innersprings would stand up under the bending they go through.

Any foam mattress they happen to have will serve just as well as any other.

Q. I see. And without the mattress, in the event the customer has the ordinary foam mattress, your minimum price for one of these devices, the "3/3 (Twin) Standard," is \$269.50; is that correct?

A. That is correct.

Q. The prices, then, go up in accordance with the increased size of the bed?

A. That is right.

(Testimony of Charles Kunzelman.)

Q. May I ask you this: After you have contacted a customer and they want one of these devices, it is necessary for you then to order one of these from Thorpe & Draper; is that correct?

A. That is right.

Q. You don't carry them in stock, so that you would have to get the information from the customer as to the size of bed he had and what he wanted and then order it for him, and then——

A. The size and the firmness; in other words, on mattresses and box springs there is also the matter of firmness. In other words, people like different firmnesses, all [54] the way from soft to orthopedic hard. So, therefore, we specify the degree of firmness they want the mattress, and size, and whether it is to be hung in a regular bedstead or whether it will be on casters to be used in front of a headboard.

Q. In other words, each one of these devices you sell, with the possibility of the one exception that you have already mentioned, is custom made?

A. Yes. We occasionally have sold one off the floor, somebody in a hurry, if we happened to have what they wanted. In other words, if we have a twin-size bed with a full mattress, for example, on the floor that we use as one of our demonstrating models, and if somebody should, by reason of health or some reason, be in urgent need of one, and if that particular model and size suited them, we have in cases given them from our models in such instances.

Q. But the great majority of your sales are over

(Testimony of Charles Kunzelman.)

a period of negotiations with the customer, finding out what he precisely wants, ordering that, and then filling the order; is that right?

A. Yes, that is right.

Q. When the Sleeper Lounge partnership was formed, what trade-mark was adopted for use on your goods? A. Sleeper Lounge.

Q. Have you used that trade-mark on all of your goods [55] since the formation of your partnership? A. Yes.

Q. Have you used any other trade-mark?

A. No.

Q. I would like to show you now what purports to be an advertisement of your organization and ask you if you can identify that? A. Yes, I can.

Q. When was that ad circulated, approximately? Is that one of your early ads, or one of your later ads?

A. That is an earlier one. That was Connie Russell that we used, I would say, about the early part of 1954.

Q. That was when you first started to put these things on the market; is that correct?

A. Yes, that is right.

Mr. Lyon: May I have this marked for identification next in order?

The Clerk: Defendants' G.

Mr. Lyon: I would like to offer it in evidence.

The Court: All right.

(The document referred to, marked Defendants' Exhibit G, was received in evidence.)

(Testimony of Charles Kunzelman.)

Q. (By Mr. Lyon): I show you another of what purports to be an ad of your organization and ask if you can identify that, sir? [56]

A. Yes, sir; that is one of our ads.

Q. When would that ad have been circulated, approximately?

A. Either in the latter part of 1953 or the early part of 1954.

Q. Approximately the same time as the advertisement, Exhibit G, the last one I showed you?

A. Yes.

Mr. Lyon: I will offer this as Defendants' Exhibit H in evidence.

The Clerk: Defendants' Exhibit H.

(The document referred to, marked Defendants' Exhibit H, was received in evidence.)

Q. (By Mr. Lyon): Now, Mr. Kunzelman, after you had circulated advertisements of the type of Exhibits G and H, you changed your advertisements, as I understand it, to the type illustrated by Plaintiff's Exhibits 16, 17 and 18; is that correct?

A. That is right.

Q. Why did you make that change, sir?

A. Well, there are several reasons, actually. One of them is the fact that we have a new product and we have to tell our story in many ways to get it across to different people, to educate them as to what we have and what it does. Therefore, that plus the fact that people do grow tired of [57] the same ad makes it advisable, from the standpoint of my

(Testimony of Charles Kunzelman.)

own knowledge and the advice of advertising men, to change ads periodically and bring out different features and facets of your product.

There was another reason also, and that is the fact that my own advertising agency and several other advertising agencies I discussed it with, that were at that time soliciting my business to get my account, stated that there should be some supplemental information put there to get across the idea that it was a bed, in other words, the "Sleeper Lounge" name itself, because there were so many lounges on the market of the living room type of furniture that some people, without looking further, might just presume it was another piece of living room furniture, and that we must get across the idea that it is a bed. So, therefore, we were looking for some descriptive phrase in connection with using the word "bed."

Do you want to know how we happened to hit on "Wonder"?

Q. No, I will get to that.

Referring now to Defendants' Exhibit E, is this representative of the next type of advertising you utilized? A. That is right.

Q. I note there that you have incorporated the phrase "The Wonder Bed" and below that "The Bed of Tomorrow for Your Comfort Today." When you adopted the advertisement, were those phrases suggested by the advertising agency or arrived [58] at in conference with the advertising agency as de-

(Testimony of Charles Kunzelman.)

scribing to the public the nature of the product you were selling?

A. Yes, in combination with the advertising agency.

“The Bed of Tomorrow for Your Comfort To-day” was solely the suggestion of the advertising agency.

“The Wonder Bed” was my suggestion, based on a suggestion my wife made one evening when I was working with different words that would describe it. I mean, I was toying with “Electromatic Bed,” which I had seen with other descriptions all using the word “Bed.” My wife said, “Why don’t you use the word ‘Wonder’ bed?”

I said, “Wonderful.”

So I gave that suggestion to my advertising agency, and they said, “Well, it sounds all right.”

Q. Now, at the time you made that decision, were you familiar with the Bell Manufacturing Company? Had you ever heard of them?

A. Yes, I had heard of them, and I knew generally the fact that such a company existed.

Q. Did you know they were making a specialty chair?

A. Yes, I would have known, if someone asked me, that they were making specialty chairs.

Q. Did you have any knowledge of their claim of a trade-mark by name of “Wonder Chair”?

A. No. [59]

Q. You had never seen the trade-mark “Wonder Chair”?

(Testimony of Charles Kunzelman.)

A. I undoubtedly saw it, because I saw some of their ads; but it never registered to the point that I associated that word with them in any way, shape or form.

Q. In other words, whenever you read one of their ads, or whatever knowledge you had at that time, "Bell" was the trade-mark they were using, and "Bell" is what you remembered?

A. Well, "Wonder" is such a common word, I would say, referred to as "wonder drugs" and "wonder this" and "wonder that," I didn't particularly associate that with anything, I mean, except "Wonder Bread."

Q. I show you now an advertisement which at the top carries the notation, "Jan. 14—Sat. Eve. Post," and ask if you can identify that?

A. Yes, I took that off a Saturday Evening Post.

Q. Why did you take it out of the Post?

A. As a sample of another use of the word "wonder."

Mr. Lyon: I will offer that as defendants' exhibit next in order.

The Clerk: Defendants' Exhibit I.

(The document referred to, marked Defendants' Exhibit I, was received in evidence.)

Q. (By Mr. Lyon): After you had adopted the advertisement of the type of Defendants' Exhibit E, for what period of time did you continue the use of that particular type of ad [60] format, with

(Testimony of Charles Kunzelman.)

“The Wonder Bed” and “The Bed of Tomorrow for Your Comfort Today” on it?

A. The last that I had used it, from the standpoint that I had anything printed with that type of ad on it, was approximately August or September of last year, of 1955, at which time my advertising agency got up some new ads, and I used those.

Q. I show you now Defendants' Exhibit A and ask when that particular ad was adopted?

A. In approximately August or September of 1955.

Q. In other words, your advertising agency advised you that the ads of the prior types of ad had expended their usefulness and it was time to adopt a new format for your ad to describe new and different properties of your device?

A. That is right.

Q. As a result of which you adopted the ad you have in your hand now, and started using the phrase, “The Electromatic Bed”?

A. That is right.

Q. How did you hit on the phrase, “The Electromatic Bed”?

A. As I mentioned before, that was one of the phrases that I originally contemplated back before we adopted the use of the phrase, “The Wonder Bed,” and it was also my advertising man came up with it himself at this time, based upon the [61] fact that, of his knowledge given to him through myself and Kay Randall and others, that some people seeing the advertisements failed to grasp the

(Testimony of Charles Kunzelman.)

fact that it was electrically controlled. So that was an effort to get across that idea. In other words, we are still retaining the "Bed" to make them realize it was a bed, but we substituted the word "Electromatic" as a basis of getting across the idea, which sometimes people who have come in and called us did not realize, that the bed was electrically controlled. They may have jumped to the conclusion that it was a hospital bed you had to crank.

Q. So you substituted this descriptive language for the descriptive language in the other ad?

A. Yes.

Q. The phrases "The Wonder Bed" and "The Bed of Tomorrow for Your Comfort Today"?

A. Yes, that is right.

Q. I recall, Mr. Kunzelman, that you have about, or had about three billboards carrying your Sleeper Lounge ad at one time.

A. That is right.

Q. Do you have any of those ads at the present time?

A. The payment of them has been stopped by me. The contract ran out in October or November of 1955, at which time two of them were taken down, and I believe there is one which [62] is still standing—at least, it was the last report I had. Somebody mentioned to me a couple of weeks ago that it was still out there. But that is apparently because they had not resold that billboard to somebody else, and are just leaving it up.

Q. So that you have no control over that billboard or what is on it or how long it stays there?

(Testimony of Charles Kunzelman.)

A. No. I suppose—I don't know—I might be able to demand that they take it down. But, I mean——

Q. Now, in the Sleeper Lounge offices, who is normally present?

A. Kay Randall is there most of the time.

Q. And yourself, occasionally, when you have the time?

A. Myself occasionally, my wife on occasion, and then other times other people.

Q. Now, when, let's say, a letter comes in directed to your organization—well, has your organization ever received any correspondence directed to the Bell Manufacturing Company on it?

A. No.

Q. Has your organization ever received any letters which referred to a "Wonder Chair"?

A. No, sir.

Q. Or a "Wonder Bed," to your knowledge?

A. To my knowledge, relayed to me by Kay Randall when [63] I asked her, she said that a few letters, in the body of the letter, did mention in some way "your Wonder Bed" or something on that order. In other words——

Q. In other words, they would say "your Wonder Bed," using it to describe the product they were inquiring about?

A. That is right.

Q. I will show you a letter and ask if you can identify the same?

A. I never have seen this particular one before, but that is a letter—seems to be a copy of a letter

(Testimony of Charles Kunzelman.)

of the type that she does write the customers; that is the type of description she gives in her letters.

The Court: Do you want to make that an exhibit?

Mr. Lyon: Let me ask this:

Mr. Elliott, I can call Miss Randall and have her identify the fact that this is a letter that they send out, if you desire. If you want to admit it in evidence for that purpose, then I won't have to call her.

Mr. Elliott: It can be admitted, with a statement to the effect, as far as I am concerned, that it is dated January 21, 1956. Whether or not this is the letter she always send out or not, I don't know, but here is a letter dated January 21st.

Mr. Lyon: I had better call Miss Randall and have her identify it. [64]

The Court: Is she here?

Mr. Lyon: She will be here at about 11:00 o'clock, your Honor.

The Court: All right.

Q. (By Mr. Lyon): In the course of the selling of these products, Mr. Kunzelman, you personally have transacted all of the business—I mean, you have answered the phone, you have answered letters, you have talked to people who come through the door, and negotiated the sales yourself?

A. Yes, sir.

Q. Have you ever received any phone calls of any nature wherein the Bell Manufacturing Company was referred to by the purchaser?

(Testimony of Charles Kunzelman.)

A. No, sir.

Q. Did you ever talk to any customer who came into the door in which the Bell Manufacturing Company was ever referred to? A. No, sir.

Q. Have you ever, in your association in this business, had anybody who was interested in purchasing one of your devices mention the Bell Manufacturing Company?

A. I don't recall any such incident.

Q. Has anybody ever mentioned "The Wonder Chair"? A. No.

Q. Has anybody ever called your product other than [65] by the term "Sleeper Lounge" or "Sleeper Lounge the Wonder Bed," I mean, when they give it a name other than calling it "The Wonder Bed"?

A. Well, I mean, in other words, as far as apart from—I mean, they may have referred to it, I mean, not knowing just what—I mean, at some of the shows we have shown at, somebody might come along and say, "What's this?" But where they have called it something else, in overwhelming instances they have referred to it as "Sleeper Lounge." In just a very few instances they have mentioned "your Wonder Bed."

Q. What is the principal type of customer that you have for this item—or types?

A. Well, we have at this time the—our customer clientele would be largely in two different categories: No. 1, people who are fairly well off finan-

(Testimony of Charles Kunzelman.)

cially so that three hundred dollars does not seem too much for them to pay for a bed.

Q. Could you identify a few such type of customers?

A. Yes. There are celebrities such as Harpo Marx, Lee De Forest, the father of radio and television; Mr. Kindelberger, the President of North American Aviation; Mr. Snyder, vice-president of Chrysler Motors—

The Court: A little louder. I can hear you, but I don't know whether counsel can hear you. [66]

Mr. Lyon: Well, that is enough.

Q. What are the other class of customers to whom you sell?

A. People who have some form of disability or illness, to which this ministers in some way; not necessarily people who are laid up, but people who have back trouble or leg trouble or heart trouble or something of that nature, so that they have more urgency. As I stated before, people usually, because of the price, take a long time to make up their mind in buying this product, unless, as I say, No. 1, they have either enough money so that it doesn't matter much to them, or, No. 2, they have some disability so that the relief of pain or what not—so that they have more of an urgency so as to not take too long for them to make up their mind in connection with the matter.

Mr. Lyon: That is all I have for the present, your Honor.

(Testimony of Charles Kunzelman.)

The Court: We might stop and take the recess.

(Recess.)

The Court: We will have the witness resume the stand.

Cross-Examination

By Mr. Elliott:

Q. Mr. Kunzelman, have you personally observed, controlled and planned, together with your advertising firm, the [67] layout of your advertisements? A. Yes, I have.

Q. But you do not believe in false, misleading advertising, do you? A. I certainly do not.

Q. You mentioned that you sell a substitute for a box spring and mattress, and I believe you also mentioned that you sell a box spring and mattress. Could you clarify that?

A. We have a substitute for—Let's put it this way: What we have is a substitute for an ordinary box spring and mattress.

Q. Can you structurally define the product you sell? I am still confused.

A. Our product is something which takes the place of an ordinary box spring and a mattress, except it has a mattress in connection with it, it has springs in most cases, and it has two motors by which one can actuate that mattress to go into any desired contour position, resting position.

Q. Would I be describing it correctly if I said that it had a deck or frame, in which was enclosed a mechanism and on which was disposed a mattress?

(Testimony of Charles Kunzelman.)

A. That is fairly close.

Q. Is that an accurate description?

A. That is fairly accurate, yes.

Q. Is there any conventional furniture term which [68] could be applied to your product?

A. No, because it is an entirely new product. We run across that. Even in shipping, we have to come in under a misapplication because there is nothing existing which describes that product.

Q. For what purpose is your product designed to be used?

A. I should think that would be fairly obvious. To enable people to get into certain positions without resorting to the makeshift of piling pillows or not being able to achieve it at all.

Q. So that there is no particular word that can be used to describe your product? If somebody were to ask you what kind of product you made, you couldn't tell them?

A. No, I wouldn't say that.

Q. Could you tell me what the word is, then, or the combination of words?

A. I could express that in a number of different ways, I mean, and I do constantly, I mean, to people. I could say, "Electrically actuated box spring and mattress." I mean, I could describe it in a number of different ways. There is no one word I could describe it. I don't know of a single word. If I could describe it with one word, I would use that as a trade-mark, but I haven't found any one word.

(Testimony of Charles Kunzelman.)

But there are many different phrases by which you could describe it. [69]

Q. You say if you could describe it with one word, you would use it as a trade-mark. You mean there are no two words you can use to describe it?

A. Not fully. That is what we ran across with "Sleeper Lounge"; it didn't fully describe it. So that we have further added to those in a descriptive sense, to further clarify what it is.

Q. "Sleeper Lounge" describes it partially, anyway?

A. That is right. You can sleep in it and you can lounge in it.

Q. Is it possible that your product, with a suitable covering, might be used in a den or living room?

A. Yes, it could be, but we haven't sold it with such covering. We have never sold it as living-room furniture. If anybody wants to do that, they have to re-cover it themselves. We have only sold it with mattress ticking.

Q. Would you say that was one of the features of your product, though?

A. We have never stressed it in any way, shape or form. There are many features. There are other types of uses that we might go out in the future. For instance, for institutional use, hospitals, hotels—could be used in living rooms as a studio, but in a living room it would have to be covered with material similar to this, upholstering material, and it

(Testimony of Charles Kunzelman.)

would then become a studio couch. A studio couch is different [70] from a chair.

Q. If you were to drape a blanket over it, would it appear like a studio couch, in one position?

A. Like a studio couch? Yes, it might appear like a studio couch if you were to drape it in a certain way.

Q. If you were to put sheets on it, and a pillow, would it appear like a Hollywood bed?

A. Yes.

Q. What kind of a product would you describe as a "contour chair"?

A. What kind of product? You mean, how would I describe a contour chair?

Q. How would you describe a contour chair?

A. Well, a contour chair is a chair which has a contour in it.

Q. Has a contour in it? Do you believe your product has any of the features of a contour chair?

A. There are many things that have features of a contour chair, yes. Our bed can assume a position similar to a contour chair, but it can also assume others. In other words, it is—we don't describe it as a contour chair.

Q. So that when you stated earlier in your testimony that your product could not assume the position of a chair, you did not mean that it could not assume the position of a contour chair? [71]

A. No, I did not include a contour chair in that. I talked about a chair in which your feet rest on the ground, similar to this chair here.

(Testimony of Charles Kunzelman.)

Q. Do you believe a purchaser of a contour chair could use your product to fulfill his requirements or some of his requirements?

A. We have many people who have a contour chair, who have bought our bed. In other words, there is nothing—I don't quite understand the question.

Q. In other words, they bought your bed because they liked to rest in it? A. Yes.

Q. Have their body in contour?

A. That's right. They found the value of that position, and then they wanted it in more places than just in their living room.

Q. Do you believe your product could be used as a reclining chair?

A. No. Well, as I say, the only thing that—the only possible use that you could ever make of our bed as a piece of living-room furniture is as a studio couch. It is not a chair. In other words, a chair is something, I mean, which looks like that (indicating). It has an upright back and has a place to put your feet to sit in it.

Q. You say a chair has an upright back? [72]

A. That is, generally speaking. I mean, it has more or less. Let me amend that, then, to say that it has a back in a more or less upright position.

Q. What do you mean, "more or less"?

A. Well, I think the answer is fairly close. It should suffice, unless you are just quibbling in the matter.

Q. I don't want to quibble.

(Testimony of Charles Kunzelman.)

To what maximum angle does the back of your product achieve towards the upright?

A. Approximately 80 degrees.

Q. Approximately 80 degrees. Do you think that is more or less upright? A. Yes.

Q. So that from that aspect your product converts to a position having that feature of the chair—in other words, it has a back that is more or less upright?

A. You might say a horse is similar to a man because he has legs. In other words, that is part of it. In other words, not as far as the whole product is concerned. The back goes up, but the foot doesn't go down so that you can put your feet on the ground.

Q. Do you feel that is a requirement of a chair?

A. My interpretation of what a chair is, yes, and a common interpretation that the public would assume.

Q. Can you sit on your product? [73]

A. As you would on a davenport or studio couch or bed; not as you would in a chair.

Q. But it does have a back so you could sit on it?

A. No, it doesn't have a back.

Q. It doesn't have a back? A. No.

Q. In other words, when you adjust it and bring that thing up——

A. It doesn't have a back. In other words, you are creating a back from a lying position. That is a different deal. In other words, if you put——

Q. Let me ask you this question: If this cushion

(Testimony of Charles Kunzelman.)

were not separable but instead were part of this back, would this still be a chair? I am referring to Plaintiff's Exhibit 1.

A. How is that again?

Mr. Elliott: Would you please read it?

(The reporter read the pending question.)

Mr. Lyon: I wonder what the purpose of all this is. I don't see the relevancy of the defendant's interpretation of "a chair" in this instance. The only thing that is important is whether the plaintiff used it in his trade-mark registration.

The Court: This is cross-examination. I will permit some latitude.

You may answer. [74]

I will overrule the objection.

The Witness: I would say, if you took that cushion away from the particular chair, it would still be a chair, yes.

Q. (By Mr. Elliott): So that it is not a criterion of defining the chair that the cushion is separable from the back, or that the back is separable from the seat cushion, or——

A. I did not make that definition. You misunderstood me, if you think that I made such a definition.

Q. Can you recline on your product?

A. What is your interpretation of "recline"?

Q. Well, I am not an expert in furniture, so——

A. That is what I would like to ask you. In

(Testimony of Charles Kunzelman.)

other words, if you are getting technical, then I want to know exactly what you mean by "recline."

Q. I am reclining now (demonstrating).

A. We can't do that on ours, no, because you have your feet on the floor.

Q. I am reclining now (demonstrating).

A. Now, do you mean, can I get into that same position?

Mr. Lyon: May the record have some indication of what the attorney for the plaintiff is doing?

The Court: Yes. For the record— [75]

Mr. Elliott: Yes, for the record, I had positioned myself in Plaintiff's Exhibit 1 with my feet on the floor, and thereafter I positioned myself in Plaintiff's Exhibit 1 with my feet elevated.

The Witness: You cannot do that same thing with the Sleeper Lounge. You can't sit down and from that sitting-down position recline back. In other words, you have to lie down first. In other words, you assume the position of lying in bed. Then you can raise your feet or the back.

Q. (By Mr. Elliott): Let me ask you this, then: It is possible with your product to angulate the feet and angulate the back; is that not correct?

A. That is possible in lots of products, from the standpoint of angulating.

Q. I am asking about your product.

A. Yes.

Q. You can angulate the feet?

A. If you mean by "angulate" coming away from a horizontal position—

(Testimony of Charles Kunzelman.)

Q. I am going to the blackboard and show you what I mean.

You will excuse my rough sketch, but I am trying to illustrate your product as including a mattress and a base structure. A. That is right. [76]

Q. I am trying to illustrate it in another position where the back has been angulated upward and forward. A. Yes, that can be done.

Q. Can that be done with your product?

A. Certainly. We state it in every one of our pictures, that it goes into that position.

Q. When your product is disposed in that second position, with the back angulated upward and forward, would you say a person would be reclining in your product?

A. Not in the sense that you apparently are driving at. In other words, from the standpoint if you are trying to compare reclining in a chair with reclining on that bed with the back up—in other words, if you can be said to be reclining in a hospital bed, if that is what you mean by “reclining,” then—in other words, a position similar to what you achieve in a hospital bed, yes, you can recline. But from the standpoint of reclining in a chair, which you are trying to draw a parallel to——

Q. I am trying to draw a parallel, yes.

A. In other words, in that sense, no. In other words, there is very definitely a distinction between that bed, on which your feet never go down and rest on the floor, and something like this, which is primarily a living-room piece of furniture which

(Testimony of Charles Kunzelman.)

purports to be a chair except when it converts into a bed, which is an entirely different type of [77] thing.

Q. I am not at this time discussing the respective structures. I am only discussing how they are used. Let me ask you a further question:

Would you say that a chaise lounge is a bed or a chair?

A. I don't know. I am not particularly acquainted with a chaise lounge. I have never made a study of them. I am not an expert on that subject.

Q. But you have been in the furniture business since 1946?

A. Yes, but I have never sold a chaise lounge.

Q. You wouldn't say it is a bed or it is a chair?

A. It has some features, of course——

Q. Would you say your product has some features of a bed?

A. No, I wouldn't—Of a bed, yes; but it has no features of a chair.

Q. In other words, you can't sit in it?

A. No, not in the sense that you can sit in a chair; no, sir.

Q. The only distinction——

A. You could sit on it in the same way you can sit on your bed, that is, with having no support for your back.

Q. Could you lean your back up?

A. Then you are different, then you are not sitting on [78] it; then you have lain down on the bed and brought the back up.

(Testimony of Charles Kunzelman.)

Q. I am sorry, I guess I haven't made myself clear. Let's put an individual in the product (drawing on the board).

A. He is not now sitting.

Q. He is not sitting? A. No.

Q. Can you tell me what he is doing?

A. He is lying in bed. (A pause.) That's a fact. It's a bed. He is lying in it. If you put pillows behind you on the bed, are you sitting or lying flat?

Q. I would say you're sitting.

A. That is a difference of opinion. I would say you are still lying in bed. That is a difference of opinion.

Q. But you are in a sitting position, is that correct; when the back of your product is raised upward and forward, and the person is disposed in your product, is he in a sitting position?

Mr. Lyon: I would like to object to that as being repetitive. It is merely argumentative now.

The Court: Yes, I will sustain the objection.

You have covered that.

Q. (By Mr. Elliott): Can you lounge on your product? A. Yes.

Mr. Lyon: I will make the same objection; that we have [79] already covered that territory.

The Court: Well, I will let his answer remain. He said "Yes."

Didn't you?

The Witness: Yes.

Q. (By Mr. Elliott): You can lounge on your

(Testimony of Charles Kunzelman.)

bed. Can you tell me what the word "lounge" means, in furniture terms?

A. No, I can't. I have no particular definition. I mean, I never looked it up.

Q. What does it mean to you?

A. It means, as related to our product, in which I have thought of it in terms, it means lying in the bed in a comfortable position.

Q. When did you start using the phrase "Wonder Bed"?

A. Some time in 1954. I don't remember now from memory exactly when it was; somewhere along about the middle of the year.

Q. How soon after you started using the phrase "Wonder Bed" did you receive, or approximately how soon after did you receive a notice of plaintiff's registered trade-mark?

A. As I recall, fairly soon. I would say it was within a month after we had first published some ads.

Q. You stated that you were involved in several other activities and that the defendant company, Sleeper Lounge Company, was sort of a sideline; is that correct? [80]

A. It is. I am engaged—I am president of another company, to which in this past year I have devoted the greater bulk of my time. In other words, I have devoted somewhat less than 50 per cent of my time to Sleeper Lounge, and somewhat more than 50 per cent to my other company.

Q. And of that somewhat less than 50 per cent

(Testimony of Charles Kunzelman.)

of your time, how was that time devoted, just generally? In other words——

A. Well, devoted to a little of everything. I have personally spent a lot of time at each one of our shows. I have been at the store at various times. I have been in conference with advertising people. I have done various different things: all the executive functions, sign the checks, paying the bills, supervising the work, and——

Q. Well, if you were to say, of that less than 50 per cent, how much of your time was devoted to actual personal selling of your product?

A. That has varied. There have been times when I devoted quite a bit of time to it, and then there were other times there might be weeks or a month or two go by in which I did none. But I mean there have been periods of time when I did it quite intensively and saw lots of people and talked to lots of people and made a lot of sales myself.

Q. You stated in your earlier testimony that your advertising men just changed from the first form of advertising to [81] another form in which they used the word "Wonder," and in connection with the reasons you stated as your first reason that it was for educational purposes; is that correct?

A. As far as the bed is concerned, using a phrase which had "bed" in it, yes, because I stated that some——

Q. What about the word "wonder"?

A. Well, no, that didn't enter into it. That was merely another descriptive word. In other words,

(Testimony of Charles Kunzelman.)

we were not trying to educate the people on “wonder.” We were trying to educate people and get the idea across that in every case they would realize it was a bed.

Q. So that, of those two words, “bed” was the real heart of it?

A. Yes, “bed” is the real heart of it, that is right. In other words, that is the word that we wanted to stress.

Q. Because that told them what kind of product you were selling?

A. That is right. In other words, that it was—so that people would not think it was the type of lounge that was other than a bed.

Q. I show you Defendants’ Exhibit E, which is a brochure in connection with your product, on the back side of which are listed five features of your product. Will you kindly read the third feature (handing document to the witness)? [82]

A. “Sleeper Lounge is available in any bed size from twin to king. It will fit Your bed Stead or may be used as a Hollywood Bed or Studio Couch. The superb mattresses by custom builders Thorpe & Draper are available in innerspring or foam rubber, in any desired firmness. The specially constructed innerspring mattresses are fully guaranteed for 10 years, the foam rubber for 20 years.”

Mr. Elliott: We have a catalog page describing one of plaintiff’s products. May that be plaintiff’s exhibit next in order, your Honor?

The Court: All right.

(Testimony of Charles Kunzelman.)

Mr. Lyon: May I ask when that was published?

Mr. Schapp: First in 1947.

The Clerk: Plaintiff's Exhibit 19.

(The document referred to, marked Plaintiff's Exhibit No. 19, was received in evidence.)

Q. (By Mr. Elliott): Mr. Kunzelman, I show you Plaintiff's Exhibit 19 and Plaintiff's Exhibit 17. In Plaintiff's Exhibit 17 there is shown a woman disposed on a furniture product. In Plaintiff's Exhibit 19 there is shown a woman disposed on a furniture product.

The product shown in Plaintiff's Exhibit 17 is the product of your Sleeper Lounge Manufacturing Company.

The product shown in Plaintiff's Exhibit 19 is the product of the plaintiff in this action. [83]

Can you tell me the difference in the position the woman is disposed in, in each of these exhibits?

A. Well, there is some slight difference. I mean——

Mr. Lyon: Your Honor, I think the documents speak for themselves. I don't see any reason why——

Mr. Elliott: Mr. Kunzelman is an expert in furniture, your Honor.

Mr. Lyon: He has not been qualified as an expert in furniture. He has been qualified as a man who has been in the business.

The Court: You may answer, Mr. Kunzelman.

The Witness: The position that the people are in

(Testimony of Charles Kunzelman.)

is somewhat similar. I am not contending in any way, shape or form that you could possibly get into the same position on this chair as you can in our bed. You can get into the same position in a lot of different things. There are a million products in which you can get into the same position. I mean, you have no patent on the position.

Q. (By Mr. Elliott): We agree with you; we don't have a patent on the position. You are entirely right. So that you would say, then, that the difference between the products is the manner in which you achieve the position?

A. It is more than that. It is a lot more than that.

Q. But at least, as between these two exhibits, that is the only— [84]

A. You have one in which you have somebody in somewhat the same position as you have in there. I mean, you have that, and that is all you do have.

Mr. Elliott: We have no further questions, your Honor.

Redirect Examination

By Mr. Lyon:

Q. Mr. Kunzelman, to your knowledge, has anybody purchased one of your devices as a substitute for a chair? A. No.

Q. Has anybody ever purchased one of your devices, to your knowledge, for use as a living-room piece of furniture?

A. Yes, as a studio couch.

(Testimony of Charles Kunzelman.)

Q. As a studio couch? A. Yes.

Q. But not as a chair?

A. Not as a chair.

Mr. Lyon: That is all.

The Court: That is all. You may step down.

Mr. Lyon: Miss Randall, will you take the stand, please?

KAY RANDALL

called as a witness on behalf of the defendants, being first duly sworn, was examined and testified as follows:

The Clerk: State your name, please. [85]

The Witness: Kay Randall.

Direct Examination

By Mr. Lyon:

Q. What is your present occupation, Miss Randall?

A. I am employed as—well, I have often wondered, if I may say so. I do the sales work and I do the small amount of bookkeeping—of course, Mr. Kunzelman oversees the major portion and the banking and the general business of the office.

Q. In other words, you are the employee of the Sleeper Lounge Company? A. That is right.

Q. Do you answer the mail that comes to the organization? A. All of it, I would say.

Q. Do you answer the telephone calls?

A. That is correct.

(Testimony of Kay Randall.)

Q. Except when Mr. Kunzelman happens to take the phone? A. Yes.

Q. Do you service the customers who come in through the door? A. I do, indeed.

Q. When you receive inquiry by mail or inquiry by phone, requesting information concerning your product, do you send any kind of response? [86]

A. Yes, I have typed up a little form letter that Mr. Kunzelman has approved of.

Mr. Lyon: Will you mark that as defendants' exhibit next in order, please?

The Clerk: Defendants' J.

(The document referred to was marked Defendants' Exhibit J for identification.)

Q. (By Mr. Lyon): I show you a letter identified as Defendants' Exhibit J, and ask you if you can state what that is.

A. This is a letter that I send out. The only deviation ever made from this letter—this is the basic letter, understand—is if a person asks some specific question pertinent to their particular need, in which case I elaborate in a small sense.

Q. When did you first send out a letter in this form? Do you recall?

A. Oh, I have been using that letter approximately for about a year.

The Court: Do you want to make it an exhibit now?

Mr. Lyon: Yes, I would like to offer this in evidence, your Honor.

(Testimony of Kay Randall.)

The Court: All right, it may be received as the next exhibit.

The Clerk: Defendants' Exhibit J. [87]

(The document referred to, marked Defendants' Exhibit J, was received in evidence.)

Q. (By Mr. Lyon): Prior to the use of this letter—you used this particular form during 1955?

A. That is correct. Maybe a different phraseology and a different price, you see, and everything, but the basic part of the letter is exactly the same.

Q. Prior to the adoption of this particular form letter, what type of communication did you send out? A similar type of letter?

A. Oh, yes; similar type.

Q. Did any of the letters you have ever sent out in response to an inquiry ever use the word "Wonder"?

A. Positively never.

Q. During the time that you have been on duty in the Sleeper Lounge Company by way of answering mail, phone calls, letters, has anybody ever referred to the Bell Manufacturing Company?

A. Never once—never.

Q. Has anybody ever used the phrase "Wonder Chair"?

A. No one who ever entered my shop and has asked to see our Sleeper Lounge has ever mentioned the word "Wonder" in any way.

Mr. Lyon: That is all, Miss Randall. [88]

(Testimony of Kay Randall.)

Cross-Examination

By Mr. Elliott:

Q. Miss Randall, you state that during the year 1954 you sent out similar letters to the——

A. That is right, sir.

Q. ——Defendants' Exhibit J?

Is this the only type of letter you ever sent out?

A. No.

Q. Or similar to this?

A. It was very similar in word structure. The only deviation, as I said before, was perhaps some particular question a person would ask in regard maybe to a certain illness they might have or some particular need, in which case I would elaborate a bit. Structurally, it would remain practically the same.

Q. Have you ever sent out a printed letter?

A. Let me think about that. Printed letter? Not I, myself, no.

Q. But you are the one who answers all the mail? A. Yes, that is right.

Q. And how long have you been answering all the mail?

A. Well, ever since the company was organized, two and a half years ago—approximately two and a half years. I think it lacks about six weeks.

Q. Would you say, then, that neither the printed letter [89] nor a typed letter has ever been sent to any customer in which the word "Wonder" is used.

(Testimony of Kay Randall.)

A. Oh, yes, that I can answer emphatically; the word "Wonder" has never been used in a letter of any kind that has gone out from the office.

Q. As part of the brochure?

A. Yes, we had a brochure in which the word "Wonder" was employed.

Q. Was there a letter in that brochure?

A. No. The brochure would be included in many instances.

Mr. Elliott: I have here a piece of printed matter put out by the Sleeper Lounge Company, which I would like to have identified as plaintiff's exhibit next in order.

The Court: All right.

The Clerk: Plaintiff's Exhibit 20.

(The document referred to was marked Plaintiff's Exhibit No. 20 for identification.)

Q. (By Mr. Elliott): Miss Randall, have you ever seen this printed matter, Plaintiff's Exhibit 20, before? A. Yes, I have.

Q. Have those ever been used by you?

A. Let me think. I believe that this is the letter that was sent out at Christmas time. Would this comprise a printed letter? I mean, I didn't regard it as such. When I made that statement, I didn't recall. If that is in your [90] mind—

Q. I don't know how else you would describe it. Maybe you can tell me how you would describe it.

A. Well, "printed letter" means to me exactly a

(Testimony of Kay Randall.)

printed letter. I regard this as an advertising brochure.

Q. Is it written in letter form? A. Yes.

Q. Is it signed "Very sincerely yours"——

A. Yes.

Q. ——"by Sleeper Lounge Company"?

A. Yes. But I don't regard that as a letter. I regard that as an advertising brochure that was sent out to the Christmas trade.

Q. Is the word "Wonder" used in this letter, incorporated in this brochure?

A. Yes, it is. I see it here.

Q. Is it used prominently in the advertising matter accompanying the letter? A. Yes.

Mr. Lyon: I object to that, your Honor. That calls for a conclusion of the witness, unless we have some definition of what he means by "prominent."

The Court: I will let her answer. I will overrule the objection. I will allow the answer to remain.

Q. (By Mr. Elliott): Your answer is [91] "Yes"? A. Well, yes, I think so.

Mr. Elliott: I have no further questions, your Honor.

Mr. Lyon: I have no further questions.

The Court: You may be excused.

Mr. Lyon: The defense rests, your Honor.

The Court: The defense rests.

Do you have any further testimony?

Mr. Elliott: I think we had better have this entered.

The Court: All right, it may be received.

The Clerk: Plaintiff's Exhibit 20.

(The document referred to, marked Plaintiff's Exhibit No. 20, was received in evidence.)

Mr. Lyon: There is only one matter, your Honor—the chair, Exhibit 1 has been admitted for the purpose of illustration only.

The Court: Yes.

Mr. Lyon: There is nothing in the record as a substitute for it. I want to call that to the plaintiff's attention.

The Court: We have just the testimony about the chair. We didn't know how to handle this chair.

Mr. Lyon: I wonder if they intend to put in any drawings or photographs as a substitute?

The Court: Well, we have the photographs in already.

Mr. Elliott: Yes.

The Court: I was going to ask Mr. Elliott to arrange [92] with his men to come and get the chair.

Mr. Elliott: Yes, your Honor.

The Court: Do you rest, too?

Mr. Elliott: Yes, we do, your Honor.

The Court: All right. I will take the matter under submission.

You have made statements, and I have the argument. Is there anything more anybody wants to say or do?

Mr. Lyon: I would like to make one observation, your Honor, that I did not know before, and if I may take a moment of your time.

The Court: Certainly.

Mr. Lyon: The trade-mark asserted by the plaintiff in this action is "Wonder Chair." Their own expert witness, Mr. Brown, on the stand testified with respect to every advertisement they have put in evidence that the trade-mark in use was the the word "Bell." Consequently, as far as this record is presently concerned, there is no evidence whatsoever of any trade-mark use of the words "Wonder Chair" by the plaintiff. Consequently, I believe that the registration was invalidly issued. I don't mean by that to purport that anybody filed any false affidavits or anything else. I believe each of the gentlemen whose signatures appear on the document believed what they were purporting to swear to. However, I think an error of law was made on their part in filing the application, [93] and I believe in filing their affidavits in support of the incontestability of their registration. Their own witness, their own expert has testified that the trade-mark they are using is "Bell," not "Wonder Chair."

That is all I want to point out.

The Court: All right, Mr. Elliott and Mr. Schapp, I have heard from you extensively and I have your trial memoranda. Is there anything more you want to say?

Mr. Elliott: There is one point I would like to bring out, your Honor.

The Court: Certainly.

Mr. Elliott: Without going to the merits of the case at all, Mr. Lyon in his opening statement referred quite extensively to the Lanham Trade-mark Act, which, after all, plays a very considerable part

in your decision, and Mr. Lyon made certain remarks which I would like to refute to a certain extent so that that doesn't stand entirely alone in the record.

Mr. Lyon stated that Daphne Roberts, who is now Daphne Reed, Assistant Commissioner of Trademarks, in charge of the Trade-mark Division, had set forth or given the viewpoint that the 1946 Act was purely procedural and did not change the substantive law in any respect. Mr. Lyon further stated that this had been the general feeling among attorneys and the like.

I don't agree with that contention, and I refer your Honor to the commentary of Daphne Roberts in 15 U.S.C.A. at [94] page 265, in which on two occasions she has stated that the Act creates substantive rights in the registrant.

I also refer you to a further provision of her commentary in which she states, "The prohibition against registration of geographical names, descriptive words, and surnames is also relaxed."

That is all I have to say, your Honor.

The Court: I will take the matter under submission, then.

Mr. Elliott: Thank you.

The Court: Mr. Elliott, how are you going to get your chair out of here?

Mr. Elliott: We will have to call the deliveryman. We will take care of it, your Honor.

(Discussion off the record.)

Mr. Elliott: I wonder whether any additional briefs would be in order, your Honor?

The Court: You have filed quite extensive pre-trial memoranda, and I have the pretrial and I have heard the case. I don't think so.

Mr. Elliott: Fine.

The Court: Thank you. [95]

[Title of District Court and Cause.]

CERTIFICATE

I hereby certify that I am a duly appointed, qualified and acting official court reporter of the United States District Court for the Southern District of California.

I further certify that the foregoing 95 pages comprise a true and correct transcript of the portions of the proceedings as noted, had in the above-entitled cause on January 25 and 26, 1956, and that said transcript is a true and correct transcription of my stenographic notes.

Dated at Los Angeles, California, this 19th day of March, A.D. 1956.

/s/ JOHN SWADER,
Official Reporter.

[Endorsed]: Filed March 19, 1957.

[Title of District Court and Cause.]

CERTIFICATE BY CLERK

I, John A. Childress, Clerk of the above-entitled Court, hereby certify that the items listed below constitute the transcript of record on appeal to the United States Court of Appeals for the Ninth Circuit, in the above-entitled cause:

A. The foregoing pages, numbered 1 to 158, inclusive, containing the original:

Complaint;

Answer to Complaint;

Interrogatories to Be Answered by Defendant;

Notice of Objection to Interrogatories;

Answers to Interrogatories by Defendants;

Plaintiffs' Memorandum in Opposition to Defendants' Objections to Interrogatories;

Interrogatories Directed to Plaintiff;

Order on Objections to Interrogatories;

Answer to Interrogatories by Plaintiff;

Defendants' Answer to Interrogatories;

Defendants' Pretrial Memorandum;

Plaintiff's Pretrial Memorandum;

Proposed Pretrial Order;

Plaintiff's Trial Memorandum;

Defendants' Trial Memorandum;

Plaintiff's Closing Brief;

Defendants' Answering Brief;

Ex Parte Order;

Plaintiff's Reply Brief;

Objections to Proposed Findings of Fact and
Conclusions of Law;

Findings of Fact and Conclusions of Law;

Notice of Appeal;

Order Extending Time to Docket Record on
Appeal;

Defendant's Designation of Contents of Rec-
ord on Appeal;

Order Extending Time to Docket Record on
Appeal;

and a full, true and correct of the Minutes for:

April 28, 1955;

August 1, 1956;

January 25, 1956;

January 26, 1956;

B. Plaintiff's Exhibits 1 through 20, inclusive,
and Defendants' Exhibits A through J, inclusive;

C. 1 volume of reporter's official transcript of
proceedings, January 25, 26, 1956.

I further certify that my fee, amounting to \$1.60,
for certifying the record, has been paid by appel-
lant.

Witness my hand and seal of the said District
Court this 26th day of March, 1957.

JOHN A. CHILDRESS,

Clerk;

By /s/ CHARLES E. JONES,

Deputy.

[Endorsed]: No. 15495. United States Court of Appeals for the Ninth Circuit. Sleeper Lounge Company, a Co-partnership Consisting of Charles Kunzelman and James A. Anderson; Charles Kunzelman and James A. Anderson, Appellants, vs. Bell Manufacturing Company, a Corporation, Appellee. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Central Division.

Filed March 27, 1957.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the
Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 15495

BELL MANUFACTURING COMPANY, a Corporation,

Plaintiff-Appellee,

vs.

SLEEPER LOUNGE COMPANY, a Co-partnership Consisting of Charles Kunzelman and James A. Anderson; CHARLES KUNZELMAN and JAMES A. ANDERSON,

Defendants-Appellants.

CONCISE STATEMENT OF POINTS UPON
WHICH DEFENDANTS-APPELLANTS
INTEND TO RELY UPON APPEAL AND
ASSIGNMENT OF ERRORS

(1) The district Court erred in holding that (Findings of Fact 11):

“Defendants, and each of them, have, in interstate commerce, and without the consent of Plaintiff, used reproductions, counterfeits, copies, and colorable imitations of Plaintiff’s Trade-mark, Registration No. 377,752, in connection with the sale, offering for sale, and advertising of goods in connection with which such use is likely to cause confusion or mistake or to deceive purchasers as to the source of origin of such goods. In this regard, the Defendants adopted and used the trade-mark

'Wonder Bed' for a lounge or contour bed, which is adjustable for use as a bed, a lounge, and a reclining chair, and employed the trade-mark 'Wonder Bed' in the sale, offering for sale and advertising of their lounge or contour bed in commerce among the several States. More particularly, the Defendants identified their contour bed or lounge as the 'Wonder Bed' in radio commercials, brochures, on truck-side advertising, on billboards, and in at least fifteen different publications, including the Los Angeles Times, Home Magazine Section, as further identified in Plaintiff's Exhibits 16, 17 and 18. Certain of the publications, including the Los Angeles Times, have wide circulation in a number of states throughout the United States. Further, in connection with the sale of Defendants' contour bed or lounge, Defendants caused a label to be affixed to the goods on which the goods are identified as the 'Wonder Bed.' "

(2) The District Court erred in holding that (Finding of Fact 12):

"The said lounges or contour beds thus sold and distributed by the Defendants are embraced within the product line of goods specified in Plaintiff's Trade-mark Certificate and have substantially the same descriptive properties as Plaintiff's reclining chairs and/or convertible chair beds, and belong to the same Patent Office classification, namely, Class 32 (Furniture and Upholstery)."

(3) The District Court erred in concluding that (Conclusion of Law 1):

“Plaintiff’s trade-mark ‘Wonder Chair’ as shown on Registration Certificate No. 377,752 is valid and subsisting, uncanceled and unrevoked, and plaintiff is the owner thereof.”

(4) The District Court erred in concluding that (Conclusion of Law 2):

“Defendants have infringed Plaintiff’s valid trade-mark ‘Wonder Chair’ as shown on Registration Certificate No. 377,752.”

(5) The Judgment of the District Court errs in adjudging that (Paragraph 1 of the Judgment):

“That a permanent injunction be granted against the Defendants from further infringement of the valid trade-mark, ‘Wonder Chair, owned by Plaintiff.”

(6) The Judgment of the District Court errs in adjudging that (Paragraph 2 of the Judgment):

“That judgment be allowed the Plaintiff in the sum of one thousand dollars (\$1,000.00) for damages.”

(7) The Judgment of the District Court errs in failing to make any findings of fact whatsoever in support of the allowance of one thousand dollars (\$1,000.00) damages.

(8) The Judgment of the District Court errs in that the record is void of any evidence or any attempt to prove damages. Consequently, the award

of one thousand dollars (\$1,000.00) damages is without any support in the record.

(9) The Judgment of the District Court errs in adjudging (Paragraph 3 of the Judgment) :

“That the Defendants be ordered to pay attorney’s fees to the Plaintiff in the sum of five hundred dollars (\$500.00).”

(10) The Judgment of the District Court errs in failing to recognize that attorney’s fees per se are not allowable in trade-mark litigation. Consequently, the award of five hundred dollars (\$500.00) attorney’s fees is erroneous.

(11) The Judgment of the District Court errs in failing to make any findings of fact whatsoever which will support the award of attorney’s fees as part of punitive damages.

(12) The Judgment of the District Court errs in failing to make any findings of fact or conclusions of law which would support the award of five hundred dollars (\$500.00) as attorney’s fees.

LYON & LYON,

By /s/ R. DOUGLAS LYON,

Attorneys for Defendants-
Appellants.

Dated this 27th day of March, 1957.

Affidavit of mail attached.

[Endorsed]: Filed March 28, 1957.

No. 15495

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

SLEEPER LOUNGE COMPANY, a co-partnership consisting
of CHARLES KUNZELMAN and JAMES A. ANDERSON,
CHARLES KUNZELMAN and JAMES A. ANDERSON,

Appellants,

vs.

BELL MANUFACTURING COMPANY, a corporation,

Appellee.

APPELLANTS' REPLY BRIEF.

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BELL MANUFACTURING COMPANY, a corporation,

Appellee.

APPELLANTS' REPLY BRIEF.

Appellants submit this reply brief to clarify the issues raised in appellee's brief.

Appellee asserts in its brief that its claim is based upon three separate grounds,

First, infringement under 15 U. S. C. 1114(1);

Second, infringement under 15 U. S. C. 1115(b), and

Third, claim of unfair competition.

It is appellants' understanding that the Trademark Act of 1946 does not provide two tests of trademark infringement. The provisions of 15 U. S. C. 1115 define the nature of the ownership of the trademark and has nothing to do with the question of whether or not the regis-

tered mark has been infringed. Section 1114 of the Act defines what constitutes infringement. Appellee's discussion of infringement under Section 1114(1) of 15 U. S. C. ignores the test set forth in that section. It is argued that if a trader in any manner whatsoever uses a colorable imitation of a trademark he can be deemed to have infringed such trademark. This is unsound and not supported by the Act. The Act defines in Section 1114(1) that "such use must be of a nature to cause confusion or mistake or to deceive purchasers as to the source of origin of such goods. . . ." The key words here are "source of origin". In order to result in confusion as to source of origin it is fundamental that both the trademark owner and the alleged infringer must have used their respective marks as a designation of source of origin, that is, as a trademark, and use in any manner other than to designate the source of origin is not trademark infringement, although under some circumstances it must constitute some other form of actionable conduct.

The argument of appellee ignores the very test of granting relief for infringement and points out the nature of the trial court's decision in this case.

The trial court incorrectly failed to determine precisely what were the trademarks of the parties involved. In other words, the trial court did not analyze precisely what was used by the parties as a designation of source of origin. As more fully discussed in appellants' opening brief, it is believed that the trademarks of the parties as established by the record are in one instance "BELL WONDER CHAIR" and in the other instance "SLEEPER LOUNGE" or viewing the situation from the most favorable to appellee, "SLEEPER LOUNGE THE WONDER BED."

With respect to the first and second grounds for relief appellee on page 7 of its brief, asserts that the trademarks utilized by the parties are identical. This is wrong. It is well established that descriptive or disclaimed material forming part of a registered trademark cannot be ignored. It is still a part of the composite trademark, *Ex parte Doltroff & Cie*, 1948, U. S. P. Q. 373; *Van Camp Sea Food Co. v. Westgate Sea Products*, 28 F. 2d 957. The only possible similarity between the marks of the two parties lies in the use of the word "Wonder", all other parts of the composite marks are entirely different and distinctive.

Appellee makes the argument that the goods are distributed in the same manner. This argument again ignores the nature of an action for trademark infringement. The goods are not distributed in the same manner, they never appear side by side in any place of business, the fact is that appellants' product is a custom-made piece of furniture. It is quite expensive [Ex. F], it is sold only through appellants' place of business with one exception [R. 65, 66] and upon special order. How appellee can contend that the goods move through the same channels of trade under these circumstances is difficult to comprehend. To refute appellants' contention that the trademark "WONDER CHAIR" is descriptive and invalid appellee places reliance on the case of *Laskowitz v. Marie Designer, Inc.*, 119 Fed. Supp. 541 (D. C. S. D. Cal., 1954), stating that the word "Contour" was held to be a valid trademark and is more descriptive than "Wonder". It is to be noted that in this case Judge Yankwich found that there was in fact a secondary meaning established for the term "Contour", under which circumstances it was completely unnecessary to determine whether or not in

the absence of such proof of secondary meaning "Contour" was a valid trademark. The Court stated, 119 Fed. Supp. 541, page 550 as follows:

" . . . warrants the conclusion that, due to the extensive publicity through national media which the plaintiffs and the defendants while they acted as the sole distributing agency, have carried on,—in the mind of the buying public, the designation 'Contour' has become identified with the plaintiff's chair and the trade-mark and trade-name under which it is marketed."

Thus appellants contend that the word "Wonder" is descriptive and is incapable of trademark significance in the absence of proof of secondary meaning and consequently appellee is not entitled to any relief whatsoever under the Trademark Act of 1946, 15 U. S. C. Section 1114(1), for the reasons more fully discussed in the opening brief of appellants.

Appellee in its argument, pages 7 and 8 of its brief, contends that appellants' products fall within the goods specified in appellee's trademark certificate so that whatever rights might be acquired under 15 U. S. C. 1115(b) are applicable. As set forth on page 17 of appellants' opening brief, the incontestability of a trademark is limited to the goods specified in the certificate. The goods specified in the certificate in this case are reclining chairs and convertible chair beds, neither of which appellee makes. The argument of appellee that it has established the exclusive right to a particular mark with respect to a particular category of goods wholly ignores the fact that the Patent Office both before and after issuing appellee's trademark registration, has registered other trademarks utilizing the word "Wonder" in the same class and

on goods more closely related to appellee's than those of appellants [see Ex. D].

The third ground for relief under appellee's theory is that the use of the word "Wonder" by appellants constituted unfair competition. This argument is predicated on two suppositions not supported in the record and which appellee in its brief makes no effort to support in the record. The first of these is that the trademark "WONDER BED" establishes in the public mind that the "Wonder" type of lounge product is manufactured by appellants. This is false. There is no testimony whatsoever to support such an inference, indeed, the only evidence shows to the contrary [Exs. C and D].

The second supposition upon which this argument is based is that appellants have deliberately copied the dress of competitor's goods. Apparently this is what appellee wishes to prove in citing *National Lead Company v. Wolfe, et al.*, 223 F. 2d 195 (U. S. C. A. 9th Cir.), decided May 17, 1955, on page 9 of its brief. There is no evidence in the record which in any way establishes that appellants copied appellee's trademark or the dress of its goods. Indeed, the evidence in the record clearly establishes the contrary, as set forth in appellants' opening brief. In any event, in order to maintain an action for unfair competition the elements of a tendency to palm off, necessary to such an action and likelihood of confusion as to source of origin are entirely missing.

In conclusion, with respect to the question of validity and infringement of appellee's trademark, the position of appellants is

(1) the trademark "WONDER CHAIR" is incapable of trademark significance, it is merely the name of the product sold;

(2) the trademark if valid has not been infringed. The trial court erred in this case and failed to precisely define just exactly what were the trademarks of the parties involved. Appellee makes no effort in its brief to clarify this situation.

The Court below and appellee both fail to recognize the trademarks involved in this litigation as composite marks which have little, if anything, in common. Appellee predicates its case on the proposition that all of the differences between the trademarks of both parties can be ignored but the only thing of importance is that "Wonder" forms a portion of its mark and the word "Wonder" has been used by appellants. This is not the law of this Circuit or any other Circuit. It is necessary that the whole composite marks be placed side by side to study both the differences as well as the similarities and it is believed that had the trial court properly applied this test it would have come to the inescapable conclusion that the marks when viewed as a whole are so different that any possibility of confusion as to source of origin of the goods is entirely lacking.

With respect to the question of damages, appellee on pages 12 and 13 of its brief, apparently takes the position that under Section 35 of the Lanham Trademark Act (15 U. S. C. 1117) the trial court is granted complete discretion as to whether or not it will grant damages and as to what that amount should be. This is not appellants' understanding or interpretation of this Act. If such a far-reaching discretion were to be granted the trial court, there is nothing to prevent the trial court from entering as an amount of damages any figure it desires. It is believed as set forth in appellants' opening

brief, that the fact of damage at least must be established before any effort can be made to ascertain the amount. Apparently in appellee's opinion it is not even necessary to prove that damage as a fact has occurred. The present record is devoid of establishing that damage as a fact occurred, or even an effort to so prove. The findings of fact and conclusions of law are completely silent in this respect. Appellant's agree that it is extremely difficult in cases of this nature to determine the amount of damage involved and that broad latitude should be given to the trial courts in finding the amount of damages. However, this does not mean that the trial courts can simply pull a number out of the air and assign it as damages without even a hearing on the question and without even an opportunity granted to appellants to review the method of computation or refute the existence of any damage. Apparently, according to pages 13 and 14 of appellee's brief, it is conceded that in trademark cases attorneys' fees *per se* cannot be granted. There is no effort to justify this capricious act on the part of the trial court. The only justification that appellee offers for this assessment is that the figure is pretty low. Thus it is conceded by both parties that this assessment is erroneous.

Conclusion.

For the reasons heretofore set forth in appellants' main brief, it is submitted that the trial court was clearly in error in this litigation. The trademark "WONDER CHAIR" or "BELL WONDER CHAIR" as same is actually used, should be held to be invalid as merely describing the product sold. In any event, even if the trademark were to be held valid, it is obviously a weak trademark entitled

only to narrow protection. In this case the goods are different, they move through entirely different channels of trade and never appear in the same stores or anywhere together in the channels of trade. Protection of the mark should not be extended to this extent.

It is believed the mark of appellee, assuming it is valid and assuming it is entitled to some degree of protection, has not been infringed by appellants, both because of the differences between the composite marks of the parties "BELL WONDER CHAIR" and "SLEEPER LOUNGE" or "SLEEPER LOUNGE THE WONDER BED", and because of the differences of the products involved. It is believed that the incontestability provisions in the Lanham Act have no application whatsoever in this litigation, first, because the mark of appellee does not qualify under 15 U. S. C. 1065(4); second, because the use of appellants is expressly outside of the effect of the incontestability provisions as provided in 15 U. S. C. 1115(b), and third, because the goods sold by appellants are not those specified in the certificate under provisions of 15 U. S. C. 1115(b).

Since the award of damages for One Thousand (1,000) dollars has been conceded in appellee's brief to be arbitrary without any relationship to any of the evidence in this case and since appellee concedes that attorneys' fees in trademark cases are not allowable, it is believed that both of these awards must be reversed.

The trial court therefore must be reversed in all respects in this litigation.

SLEEPER LOUNGE COMPANY, *et al.*,
Appellants.

LYON & LYON,
By R. DOUGLAS LYON,
Their Attorneys.

No. 15495
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of Charles Kunzelman and James A. Anderson,
Appellants,

vs.

BELL MANUFACTURING COMPANY, a corporation,
Appellee.

APPELLEE'S BRIEF.

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FILED

AUG 19 1957

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Appellee.

APPELLEE'S BRIEF.

I.

STATEMENT OF PLEADINGS AND FACTS.

A. Jurisdiction.

The jurisdiction of the District Court is based on 28 U. S. C. 1338 giving the District Court original jurisdiction of any civil action relating to trademarks and also any claim of unfair competition when joined with a claim under the trademark laws.

This Court has jurisdiction of the appeal under the provisions of 28 U. S. C. 1291.

B. Facts of Appeal.

The District Court at the conclusion of the trial, after submission of briefs [R. 3 and R. 8] rendered its decisions and findings of fact, conclusions of law, and judgment on December 10, 1956 [R. 15], from which defendants filed a Notice of Appeal [R. 20] on January 9, 1957.

II. STATEMENT OF THE CASE.

The appellee's predecessor, Joseph D. Bell, was the inventor and holder of a considerable number of patents relating to reclining chairs, convertible chair beds, and other furniture of a similar type [R. 122]. Mr. Bell engaged in the manufacture and sale of such furniture and decided, prior to 1940, to adopt and use the trademark "WONDER CHAIR," and he and his successors have since used the mark continuously in interstate commerce in connection with reclining chairs, convertible chair beds, and furniture in a similar descriptive category.

On May 14, 1940, Mr. Bell secured registration of the trademark "WONDER CHAIR" in the United States Patent Office under the Trademark Act of February 20, 1905, as set forth on Certificate No. 377,725 [Ex. 11], disclaiming the word "CHAIR." Registration under this act indicates that the Patent Office considered the mark a technical or non-descriptive mark.

On September 14, 1948, appellee republished the mark to bring the same within the provisions of the new Lanham Trademark Act of 1946, Section 12(c), 15 U. S. C. 1062C. On March 15, 1954, appellee filed its affidavit under Sections 8 and 15 of the new Trademark Act, 15 U. S. C. 1058 and 15 U. S. C. 1065, thereby making the mark incontestable.

These facts are of record in Appellee's Exhibit 11 and have not been contested by appellants.

In 1954, as early as August 31st [R. 13], the appellants began using the trademark "WONDER BED" in connection with the sale and advertising of their Sleeper

Lounge product. Appellants extensively and prominently [R. 13] displayed and used the mark in advertising and in association with their product. Appellants used the mark "WONDER BED" in a distinctive manner prominently blocked, out of syntax, in a different type, and apart from the normal description of the goods [Exs. 16, 17 and 18]. Appellants were promptly notified by appellee of the infringement [R. 7], but refused to stop the infringement and continued in such wrongful and intentional use until at least January, 1956 [R. 75].

III.

ARGUMENT.

A. Summary.

The appellants have raised the issue of validity of the appellee's trademark, the scope of protection afforded the mark, the question of infringement, and award of damages and attorney's fees. The appellants have further discussed the effect of the incontestability provisions, which actually relates to the scope of protection to which the mark is entitled.

In the following arguments, appellee will discuss the validity of appellee's mark "WONDER CHAIR" including sub-paragraphs relating to the scope and incontestability of the mark, as interpreted in accordance with the Lanham Trademark Act of 1946.

The question of infringement and the alleged defenses of appellants will be discussed under the argument so entitled, and the question of damages and attorney's fees will be separately set forth as in appellants' brief.

B. Validity of Bell's Trademark.

1. Section 15, Lanham Trademark Act of 1946, 15 U. S. C. 1065.

Section 15 provides that the right of the registrant to use a mark in commerce for the goods or services on or in connection with which the registration has been in continuous use for five consecutive years subsequent to the date of registration and is still in use in commerce shall be *incontestable* providing that an affidavit is filed with the Commissioner within one year after the expiration of such five-year period. The only exception pertinent to the present action set forth in this section is that "no incontestable right shall be acquired in a mark or trade name, which is *the common descriptive name* of any article or substance, patented or otherwise." (Emphasis added.)

It is apparent that the word "WONDER" is not the common descriptive name of any article or substance, and that, therefore, appellees have acquired an incontestable right to the use of the mark for the goods to which the registered mark has been applied. Appellants have studiously sidestepped this question (see App. Br., top of p. 17 and middle of p. 6).

2. Scope of Protection.

The appellants throughout their brief have made reference to the scope to which a mark is entitled (App. Br. p. 7) and descriptive characteristics of trademarks (App. Br. pp. 13-15).

In this respect, the appellants refer to a number of cases in which the words "Imperial," "Standard," and

“Royal” were held descriptive, *in the absence of proof of secondary meaning*. The phrase “secondary meaning” is not mentioned in the Lanham Trademark Act of 1946, but has been given much more substantial effect by the use of the term “incontestability,” the latter coming into effect on very much the same grounds as the development of secondary meaning, that is, *through long continued and undisturbed use*.

Since the question of descriptiveness is of questionable pertinence to the present action, in view of the fact that “WONDER” is not the common descriptive name of an article or substance, it is not believed necessary to this argument to cite numerous cases which would support the appellee’s position without the rights afforded appellee by the incontestability provision of 15 U. S. C. 1065.

However, it is of interest to note the case of *Laskowitz v. Marie Designer, Inc.*, 119 Fed. Supp. 541 (D. C. S. D. Cal. 1954), in which it was held that the mark “Contour” when used in connection with the disclaimed words “Chair Lounge” was a valid trademark. Certainly, the word “Contour” is considerably more descriptive than the word “WONDER.” See also *National Lead Company v. Wolfe*, 223 F. 2d 195, in which the court quotes with approval:

“‘The American Girl’ would be descriptive of almost any article of manufacture, as of shoes; that is, to say not descriptive at all.”

The same reasoning would certainly apply to the mark “WONDER.”

C. Infringement and Alleged Defenses.

1. Infringement.

The evidence establishes the fact that appellees have the right to recovery for infringement on each of three grounds, each of said grounds being separately sufficient to bring about injunctive relief and damages. Appellee's rights in this regard are set forth in Section 32(1) of the Lanham Trademark Act of 1946, 15 U. S. C. 1114(1); Section 33(B) of the Lanham Trademark Act of 1946, 15 U. S. C. 1115(B), and on the basis of the equitable principles of unfair competition, 28 U. S. C. 1338. Each of these three separate grounds of recovery will be discussed.

(a) LANHAM TRADEMARK ACT OF 1946—SECTION 32(1) 15 U. S. C. 1114(1).

Under the general infringement provisions of Section 32(1), infringement exists if appellants are using a "colorable imitation" of plaintiff's trademark in such a manner as to cause likelihood of confusion to the purchasing public.

It is apparent that the word "WONDER," as used by appellants, is not only a "colorable imitation" but goes beyond the requirements of the statute and is *an exact copy* of the mark as used by appellee. The statute does not state that the infringing use must be a trademark usage, but merely that there be a use of a "reproduction, counterfeit, copy or colorable imitation of any registered mark in connection with the sale, offering for sale, or advertising of any goods or services. . . ."

With respect to the element of likelihood of confusion or mistake, it is to be noted that 15 U. S. C. 1114(1) does not specify identity or similarity of goods, but only *likeli-*

hood of confusion. The question of likelihood of confusion necessarily depends on many factors including the type of products involved, the manner of distributing the products, and the similarity of the trademarks. In this case, the trademarks are identical [Exs. 17 and 19]: the products are distributed in the same manner—on a factory-to-you basis—and the products are similar in that they function in the same manner, are used for the same purpose, are bought by the same class of people [R. 146 and R. 79], and fall within the same descriptive category. In addition, the products are advertised in the same newspapers [R. 13, 132]. Certainly, if a purchaser were to buy a product from appellants with the trademark “WONDER BED” marked thereon, and if the product turned out to be defective, the natural result would be that the purchaser would conclude that the “WONDER CHAIR” product of appellee was similarly defective, with a consequent loss of business to appellee. (See *Pan-American World Airways v. Clipper Van Lines* (D. C. N. Y. 1951), 98 Fed. Supp. 524.)

Even assuming that the products of appellants and appellee are not identical, for infringement and unfair competition to exist, it is only necessary that they be sufficiently similar to make confusion likely. (See *G. B. Kent & Sons, Ltd. v. Paul Lorillard Co.* (D. C. N. Y. 1953), 114 Fed. Supp. 621, affirmed 210 F. 2d 953.)

(b) LANHAM TRADEMARK ACT OF 1946—SECTION 33(B), 15 U. S. C. 1115(b).

This section of the Lanham Trademark Act provides that once a registered mark has become incontestable under Section 15, as heretofore argued, the Certificate shall be *conclusive* evidence of the registrant’s *exclusive* right to use the registered mark in commerce on or in connec-

tion with the goods or services specified in the Certificate. The goods specified in the Certificate [Ex. 11], are reclining chairs or convertible chair beds. (Emphasis added.)

Thus, the effect of Section 33(B) is to give appellee the *exclusive right*, to the exclusion of everyone else, to use the mark “WONDER” in connection with reclining chairs and convertible chair beds.

It is to be noted that appellants, in their main leaflet or promotional brochure [Ex. E] describe their goods variously as “SLEEPER LOUNGE,” “*Contour Chair*,” “HOLLYWOOD BED,” and “STUDIO COUCH.” (Emphasis added.) In fact, the principal witness for appellants testified that their product could assume the position of a contour chair [R. 83], thus buttressing the statement in the advertising to this effect.

It is further obvious from a comparison of Appellee’s Exhibits 17 and 19 that appellants’ product functions as both a reclining chair and as a convertible chair bed in exactly the same manner as appellee’s product.

Thus, it is clearly evident that appellants’ product falls within the “goods specified” in appellee’s trademark certificate.

Certainly, if appellee has established an exclusive right to a particular mark with respect to a particular category of goods, in accordance with Section 33(B), then the court rightfully has the authority to enjoin others from using the same mark with respect to the specified goods.

(c) UNFAIR COMPETITION 28 U. S. C. 1338.

Although appellee is primarily basing infringement on the statutory provisions of the Lanham Trademark Act of 1946, it is clear that the appellants have also unfairly competed with appellee. Thus, in using the trademark

“WONDER BED” in conjunction with the phrase “SLEEPER LOUNGE,” the advertising and labels of appellants tend to establish in the public mind the fact that the “WONDER” type of lounge product is manufactured by the appellants. It is clear, therefore, that the appellants as latecomers are unlawfully endeavoring to take advantage of the goodwill appellee has established in the trademark “WONDER CHAIR” as a result of appellee’s continuous use of this trademark for nearly twenty years in conjunction with advertising and labels on appellee’s reclining chairs and convertible chair beds. In *National Lead Company v. Wolfe, et al.*, 223 F. 2d 195, U. S. C. A. 9th Cir., decided May 17, 1955, it is stated:

“Where a latecomer deliberately copies dress of his competitors already in the field, there is a presumption that customers are deceived thereby and the latecomer must prove that effort at deception has been futile.”

2. Alleged Defenses.

Relative to likelihood of confusion, the appellants have attempted to assert that because appellees have used the name “BELL” *superimposed* above the trademark “WONDER CHAIR” and because the appellants have used the name and descriptive phrase “SLEEPER LOUNGE” above their trademark “WONDER BED” that the word or name “BELL” should be construed as part of appellee’s mark, and that the name or descriptive phrase “SLEEPER LOUNGE” should be construed as part of the appellants’ trademark. It is to be emphasized, however, that the purpose of the trademark is to establish in the public mind the origin of the source of the goods (15 U. S. 1127); and consequently, it is conventional advertising practice and legally desirable to include the manufac-

turer's name as well as the trademark involved on all advertising matter and labels in order to bring an association in the prospective purchaser's mind linking the trademark with the manufacturer. Furthermore, as Mr. Kunzelman (the principal witness for appellants), admits on page 82 of the record, Sleeper Lounge partially describes the goods in that "You can sleep in it and lounge in it." Consequently, it is evident that the dominant portion of appellants' phrase "SLEEPER LOUNGE—THE WONDER BED," if two superimposed phrases can be considered as an entity, resides in the mark "THE WONDER BED."

Section 33(B) provides as a defense thereto a provision whereby the exclusive right will not be upheld if the infringing use is *otherwise than as a trade or service mark . . . "which is descriptive of and used fairly and in good faith only to describe to users the goods or services of such party. . . ."* (Emphasis added.) A mere glance at Appellee's Exhibits 16, 17, and 18 illustrating advertisements of appellants will establish the fact that appellants do not use the mark "WONDER BED" in good faith only to describe to users their goods or services. Furthermore, it is evident by an examination of these exhibits, and from the testimony of Mr. Kunzelman (*supra*), that the phrase "SLEEPER LOUNGE" is the descriptive portion of their advertisement and that the words "WONDER BED" are used as a trademark.

Appellants have further endeavored to avoid the incontestability provisions of Sections 33(B) by stating that they merely manufacture "a mechanized substitute for a

box spring mattress” [R. 63-64]. However, it is to be noted that this description is not used anywhere in any of the advertisements of appellants.

With respect to the effect of Sections 15 and 33 of the Lanham Act, the appellants have urged that incontestability is merely a defensive weapon and not an offensive one, citing *Rand McNally Co. v. Christmas Club* (June 14, 1955), 105 U. S. P. Q. 499. Although the facts of the *Rand McNally Co.* case are entirely distinguished from the present case, it is not appellee’s contention that Section 15 provides appellee’s with “an offensive right.” It is agreed that this section merely refers to “the right to use” and might be construed as conferring a mere defensive right. However, in the event of infringement litigation, a different case is presented, and Section 33(B) applies which specifically provides if the right to use the registered mark has become incontestable under Section 15, the Certificate shall be *conclusive evidence* of the registrant’s *exclusive* right to use the registered mark in commerce on or in connection with the goods or services specified in this certificate. Certainly, the words “exclusive right” mean the right to exclude, which is an offensive weapon. See also Mrs. Daphne Leeds’ comments, now Assistant Commissioner of Patents, in charge of Trademark Operations, 15 U. S. C. A., pages 268 and 279, *re* substantive effect of the Lanham Trademark Act of 1946.

D. Damages.

With respect to the innocent usage of the mark, alleged by appellants in their brief, on page 23, it is to be noted that the appellants commenced the use of the mark somewhere along about the middle of the year 1954 [R. 91] and did not discontinue the use of the mark until on or after January, 1956 [R. 75]. On the other hand, as admitted by Mr. Kunzelman [R. 91], the appellants received notice within approximately one month after they had published their ads, and despite this notice, they continued the use of the mark for over one year. Certainly, there was an intentional and wrongful use of the mark. In fact, even before the date of notice, Mr. Kunzelman [R. 72] knew of Bell Manufacturing Company and knew they were making a specialty chair. Furthermore, he admits [R. 73] that he “undoubtedly saw” the trademark “WONDER CHAIR” of appellee before adopting the same mark for appellants. Again, it is apparent that appellants’ use of their mark “WONDER CHAIR,” even in the initial stages, was not innocent.

Section 35 of the Lanham Trademark Act (15 U. S. C. 1117) provides in part:

“If the Court shall find that the amount of recovery based on profits is either inadequate or excessive, the Court may in its discretion enter judgment for such sums as the Court shall find to be just, according to the circumstances of the case. Such sum in either of the above circumstances shall constitute compensation and not a penalty.”

Thus, the court had the right to enter a judgment for damages regardless of whether profits or losses have been shown, in its own discretion, with respect to the circumstances of the case.

Even though the court in its proper discretion, chose a figure of one thousand dollars (\$1000.00) it is apparent that the figure is nominal in view of the extensive sales of appellant [R. 79].

See Callman, "Unfair Competition and Trademarks," 2nd Ed. page 1884, wherein it is stated:

"In all cases it is a cardinal rule that the assessment of damages is at the discretion of the Court. The harm resulting from unfair competition can seldom be estimated with even approximate precision, but this is not fatal to the plaintiff's case."

E. Attorney's Fees.

It is agreed with counsel for appellants that until relatively recently counsel fees have not been awarded in trademark cases.

However, it is to be noted in Callman, "Unfair Competition and Trademarks" (2nd Ed.), Vol. IV, page 1903, in the conclusion of his section on "Remedies," the author states:

"Courts should, however, adopt a more liberal attitude with respect to the allowance of counsel fees and other expenses necessary to the successful conduct of a lawsuit, which in the field of industrial property and unfair competition is anything but simple or usual."

More recent cases have tended to follow Mr. Callman's expressed opinion. (See Callman, "Unfair Competition and Trademarks" (2nd Ed.), Vol. IV, 1956 Cumulative Supplement, page 27; *Capehart v. Lund*, 107 Fed. Supp. 10 (D. C. Alaska 1952); *Keller Products, Inc. v. Rubber Linings Corp.*, 213 F. 2d 382 (C. A. 7, 1954).)

Again, although admittedly the court was arbitrary in assessing the amount of attorney's fees, it is clearly evident that the figure of five hundred dollars is extremely nominal. Furthermore, even assuming the damages of one thousand dollars (\$1000.00) were combined with the five hundred dollars attorney's fees to bring the attorney's fees to fifteen hundred dollars, it will be appreciated that the appellees assumed most of the expense in protecting their well established trademark against an intentional infringer. Certainly, it was within the court's discretion, particularly in view of the willful infringement, to award these nominal sums.

IV. CONCLUSION.

To conclude, appellee adopts the trademark "WONDER" in good faith, enjoys the exclusive right and use of it for sixteen years, and takes all necessary and available legal steps to maintain his rights. Then after years of such exclusive use, appellants as a newcomer use the same mark on substantially the same goods, in the same trade, in the same city, and in the same advertising media. The ordinary businessman would certainly begin to doubt the purpose of our Trademark System, if no effective protection could be obtained under these circumstances.

It is, therefore, respectfully submitted that the Trial Court should be affirmed in all respects.

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No. 15495

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

SLEEPER LOUNGE COMPANY, a co-partnership consisting
of CHARLES KUNZELMAN and JAMES A. ANDERSON,
CHARLES KUNZELMAN and JAMES A. ANDERSON,
Appellants,

vs.

BELL MANUFACTURING COMPANY, a corporation,
Appellee.

APPELLANTS' BRIEF.

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FILED

JUL 18 1957

PAUL P. MERTENS, CLERK

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Appellants,

vs.

BELL MANUFACTURING COMPANY, a corporation,

Appellee.

APPELLANTS' BRIEF.

I.

STATEMENT OF JURISDICTION.

This appeal is from the judgment of the District Court holding plaintiff's trademark "WONDER CHAIR" valid and infringed. Defendants have appealed .

The action was tried before the District Court upon the issues formed by the complaint [R3] and Answer [R8].

The jurisdiction of the District Court is based upon the Trademark Act of July 5, 1946, 60 Stat. 427, 15 USC, Chapter 22. This Court has jurisdiction of the appeal and the appeal was timely, 28 USC 1291.

The District Court at the conclusion of the trial, briefing and oral argument rendered its decision and accordingly Findings of Fact, Conclusions of Law and Judg-

ment [R15] were prepared and same were filed, docketed and entered December 10, 1956. A notice of Appeal [R20] was served and filed January 9, 1957.

II.

STATEMENT OF THE CASE.

This action was commenced by plaintiff filing its Complaint against defendants alleging infringement of plaintiff's registered trademark, Registration No. 377,752 by use of the words *WONDER BED*.

Defendants in their Answer put in issue the validity of plaintiff's trademark, the scope of protection if any to which it was entitled and the question of infringement of plaintiff's trademark. More particularly defendants asserted that the registered trademark *WONDER CHAIR* is so descriptive as to be incapable of trademark significance, that if any rights were acquired by plaintiff in the trademark *WONDER CHAIR* they must be limited to the specific mark utilized upon the specific goods upon which it had been applied. Further defendants have contended that they do not infringe, that they had utilized the phrase *WONDER BED* to describe its products and not as a trademark or designation of origin. Defendants have continually asserted that the trademark under which they do business and sell their products is *SLEEPER LOUNGE*.

At the trial of this cause there was no evidence of the existence of confusion in the trade submitted to the Court, there was no evidence of any injury or damage of any type submitted to the Court. The case was submitted upon the theory that the marks of the parties were so sufficiently similar that the trial Court could infer that a likelihood of confusion existed.

In this background the Court entered a Judgment holding plaintiff's trademark valid and infringed and awarding

\$1,000.00 for damages and \$500.00 as attorneys' fees to plaintiff. The monetary awards in the Judgment find no support in the record or in the Findings of Fact or Conclusions of Law. They were made where the record was completely absent not only of any evidence but any attempt to establish the existence of a basis therefor and without any opportunity for counsel to be heard with respect thereto. In plain English these numbers were pulled out of the air without any relation whatsoever to the record.

III.

SPECIFICATIONS OF ERROR.

(1) The District Court erred in holding that [Findings of Fact 11]:

“Defendants, and each of them, have, in interstate commerce, and without the consent of Plaintiff, used reproductions, counterfeits, copies, and colorable imitations of Plaintiff's Trade-mark, Registration No. 377,752, in connection with the sale, offering for sale, and advertising of goods in connection with which such use is likely to cause confusion or mistake or to deceive purchasers as to the source of origin of such goods. In this regard, the Defendants adopted and used the trade-mark—‘WONDER BED’ for a lounge or contour bed, which is adjustable for use as a bed, a lounge, and a reclining chair, and employed the trade-mark ‘Wonder Bed’ in the sale, offering for sale and advertising of their lounge or contour bed in commerce among the several states. More particularly, the Defendants identified their contour bed or lounge as the ‘Wonder Bed’ in radio commercials, brochures, on truckside advertising, on billboards, and in at least fifteen different publications, including the Los Angeles Times, Home Magazine Section, as further identified in Plaintiff's

Exhibits 16, 17 and 18. Certain of the publications, including the Los Angeles Times, have wide circulation in a number of states throughout the United States. Further, in connection with the sale of Defendants' contour bed or lounge, Defendants caused a label to be affixed to the goods on which the goods are identified as the 'Wonder Bed.'"

(2) The District Court erred in holding that [Findings of Fact 12]:

"The said lounges or contour beds thus sold and distributed by the Defendants are embraced within the product line of goods specified in Plaintiff's Trade-mark Certificate and have substantially the same descriptive properties as Plaintiff's reclining chair and/or convertible chair beds, and belong to the same Patent Office classification, namely, Class 32 (Furniture and Upholstery)."

(3) The District Court erred in concluding that [Conclusions of law 1]:

"Plaintiff's trade-mark 'Wonder Chair' as shown on Registration Certificate No. 377,752 is valid and subsisting, uncancelled and unrevoked, and plaintiff is the owner thereof."

(4) The District Court erred in concluding that [Conclusions of Law 2]:

"Defendants have infringed Plaintiff's valid trade-mark 'Wonder Chair' as shown on Registration Certificate No. 377,752."

(5) The judgment of the District Court errs in adjudging that [Paragraph 1 of the Judgment]:

"That a permanent injunction be granted against the Defendants from further infringement of the valid trademark, 'Wonder Chair' owned by Plaintiff."

(6) The Judgment of the District Court errs in adjudging that [Paragraph 2 of the Judgment]:

“That judgment be allowed the Plaintiff in the sum of one thousand dollars (\$1,000.00) for damages.”

(7) The Judgment of the District Court errs in failing to make any findings of fact whatsoever in support of the allowance of one thousand dollars (\$1,000.00) damages.

(8) The Judgment of the District Court errs in that the record is void of any evidence or any attempt to prove damages. Consequently, the award of one thousand dollars (\$1,000.00) damages is without any support in the record.

(9) The Judgment of the District Court errs in adjudging [Paragraph 3 of the Judgment]:

“That the Defendants be ordered to pay attorney’s fees to the Plaintiff in the sum of five hundred dollars (\$500.00).”

(10) The Judgment of the District Court errs in failing to recognize that attorney’s fees *per se* are not allowable in trade-mark litigation. Consequently, the award of five hundred dollars (\$500.00) attorney’s fees is erroneous.

(11) The Judgment of the District Court errs in failing to make any findings of fact whatsoever which will support the award of attorney’s fees as part of punitive damages.

(12) The Judgment of the District Court errs in failing to make any findings of fact or conclusions of law which would support the award of five hundred dollars (\$500.00) as attorney’s fees.

IV.
ARGUMENT.

A. Validity of Bell's Trademark.

Plaintiff has been issued Trademark Registration No. 377,752 for the trademark "WONDER CHAIR" for reclining chairs and convertible chair beds. It is the position of defendants that the word "WONDER" is descriptive of the products sold and as such is incapable of any trademark significance in the absence of establishing a secondary meaning therefor. Wonder is defined in Webster's New Collegiate Dictionary as follows:

"1. A cause of surprise or astonishment; a marvel; prodigy. 2. A miracle. 3. The emotion excited by novelty, or by something strange or not well understood; astonishment, etc."

Surely no one can exclusively appropriate the exclusive right to call a chair a chair. No one can exclusively appropriate the right to call a green chair a green chair. It is felt that the same conclusion is applicable to "Wonder Chair." As stated in Callmann Unfair Competition and Trade-Marks, 2nd Edition, page 1053:

"§70.1. The Rule of Law.

It is axiomatic that a word or phrase which is primarily descriptive of the qualities, ingredients or characteristics of the article to which it is attached or to which it has reference can not be claimed as an exclusive trade-mark. Similarly descriptive language can properly attach or refer to similar articles on the market. Therefore, the use of a similar name by another in an honest description of his product does not constitute a legal or moral wrong, even though there is some likelihood that the purchasing public might be confused as to the origin of the product."

The trial court erred in failing to apply this established principle of Trade-Mark law. It is submitted that the word 'Wonder' is in the same category as Imperial, Standard and Royal, all of which have been held invalid in the absence of proof of secondary meaning. See *Beadleston & Woers v. Cooke Brewing Co.* (7th Cir., 1896), 74 Fed. 229, wherein Imperial was held incapable of adoption as a trademark for beer; *Computing Scale Co. v. Standard Computing Scale Co.* (6th Cir., 1902), 118 Fed. 965, wherein Standard was held descriptive of scales and could not be appropriated as a trademark; *Hiram Walker & Sons, Inc. v. Penn-Maryland Corporation* (2nd Cir., 1935), 79 F. 2d 836, wherein Imperial was held descriptive of whisky and incapable of being a valid technical trademark; *Royal Silver Mfg. Co. Inc. v. National Silver Co., et al.* (D. C. S. D. N. Y., 1945), 61 Fed. Supp. 232, wherein Royal was held descriptive of silverware and not capable of adoption as a technical trademark.

It is, therefore, the position of appellant that the word Wonder is descriptive in the same manner as Imperial, Standard and Royal, having a well established meaning descriptive of chairs. Wonder being descriptive is incapable of being a valid technical trademark. Only by proof of acquisition of a secondary meaning can appellee establish any proprietary interest in the word and no effort was made to establish any such meaning.

B. Scope to Which the Mark Is Entitled.

Assuming that this Court disagrees with appellants' contention that the trademark Wonder Chair is invalid it is submitted that the trademark is a weak mark and as such is limited to enforcement against use of the identical mark on the identical goods moving through the same channels of trade. See *Sunbeam Lighting Co. v. Sunbeam*

Corporation (9th Cir., 1950), 183 F. 2d 969, and *Sunbeam Furniture Corp. v. Sunbeam Corp.* (9th Cir., 1951), 191 F. 2d 141, wherein this Court held *Sunbeam* to constitute such a mark and so restricted its enforcement. In the latter case this Court stated at page 144:

“We reaffirm the principal that the use of a distinctive or fanciful mark or name will be broadly protected, but non-fanciful words or names which have been applied to and used and registered as trademarks for a large number and variety of products by numerous manufacturers, ordinarily will be narrowly protected. *Philco Corp. v. F. & B. Mfg. Co.*, 7 Cir. 1948, 170 F. 2d 958, 961, certiorari denied, 336 U. S. 945, 69 S. Ct. 813, 93 L. Ed. 1102. The change wrought by the 1946 Trademark Act on Title 15 U. S. C. A. § 1114(1), Act of July 5, 1946, c. 540, Title VI, § 32, 60 Stat. 437, does not ‘stifle all excursions into adjacent markets * * *.’ *S. C. Johnson & Son v. Johnson*, 2 Cir. 1949, 175 F. 2d 176, 180, certiorari denied 338 U. S. 860, 70 S. Ct. 103. The differentiation is made between ‘strong’ and ‘weak’ marks based upon whether the word sought to be protected is general or fanciful.”

In the present case a similar situation is presented. Defendants' Exhibits C and D are illustrative of concurrent uses and registrations of the word Wonder. The trademark office does not conclude that appellee is entitled to exclusive appropriation of the word Wonder in class 32, Furniture and Upholstery, as evidenced by the concurrent registrations in Exhibit D. The nature of appellee's products can be determined from its advertisements, Exhibits 6, 7, 8, 9 and 10. The nature of appellants' goods may be determined from Exhibits 13, 14, 15, 16, 17, 18 and 20 as well as A and E. Obviously they are not

identical although falling within the same general classification in furniture.

Appellants' products are defined as follows by the witness Charles Kunzelman:

"A. Our product is a substitute for a box spring and a mattress. It is a box spring and a mattress, with a mechanism attached to the underside of the box spring, in a box, which box does not show when the bed is made up; and this, as I previously mentioned, we can make this in any bed size: twin size, full size, queen size, king size, or special sizes. And it can either be on casters, as a Hollywood bed, or it can be put into a regular bedstead, as pictured on this particular brochure, or in front of a headboard. In other words, it can be used any way that a box spring and a mattress can be used. And it is electrically controlled with two motors; one actuates the foot, and one actuates the head. So that a person lying in bed can actuate it and move it into any position he desires. It goes into all of the positions of a hospital bed, and can, therefore, change your bed to a reading position, looking at television, resting in bed, having the feet up, or anything that you want, for your comfort or for your health.

Q. Does that device described in that brochure, or the device you sell, ever assume the position of a chair. A. No, it does not.

Q. Always a bed? A. It is always a bed.

Q. Is that device ever upholstered? A. No, sir; it always comes covered with a mattress ticking, the same as any mattress or any bedstead.

Q. So that the manner in which you sell the device, it looks from outward appearances just like a mattress and box spring? A. Like a mattress and box spring and frame, yes; that is what it looks like.

Q. Is anyone else, to your knowledge, making a device of similar characteristics? A. No, we were unique. The only thing it could be likened to is a hospital bed, except the hospital bed looks differently, whereas this can be used in the home and looks no different than an ordinary box spring and mattress. But there is nothing of that nature that has ever been on the market before.

Q. To your knowledge? A. Yes, that is right. This product is unique.”

The product involved is expensive [see Exhibit F—a price list]. It is not sold over the counter but is custom made. Only once has a sale been made from the floor of appellants’ place of business [R65-66]. A normal sale consists of an order being placed with appellants who then construct precisely what is ordered [R68-69]. The minimum price for one of appellants’ products is \$269.50. The channels of trade are entirely different, consequently, under the doctrine of the Sunbeam cases *supra*, appellee’s trademark is not entitled to sufficient scope to include therewithin appellants’ activities.

C. Infringement.

The evidence establishes that appellee utilizes as its trademark “Bell Wonder Chair.” Appellee’s witness Harold John Miller testified on pages 151 and 152 of the record as follows:

“Q. That is the only item you put out with the trade-mark ‘Wonder Chair’ on it? A. Yes.

Q. Showing you new Plaintiff’s Exhibit 9 and specifically page 2 thereof, I direct your attention to the phrase, at the top of the page, which says, “The Bell Wonder Chair-Bed.” A. Yes.

Q. Is that item the one in front of us? A. Yes —different style.

Q. Is this the manner in which the trade-mark appears on the label on that device? A. No, I think it says, "Bell Wonder Chair." It is on the panel, here.

Q. Would you locate it for me, please? A. Yes. It is on the panel (stepping down from the witness stand and indicating).

Q. 'The Wonder Chair?' A. 'The Wonder Chair.'

Q. That is the manner in which you presently use the trade-mark; is that correct? A. Yes.

Q. How long have you used it in that format? A. For many years, to my knowledge .

Q. As long as you can remember? A. I would have to think. As far as I know, we have used that for quite a while (witness resuming the witness stand).

Q. You testified, I believe, that you have been with the organization for 15 years? A. Yes.

Q. Has it been used in that form for 15 years? A. As far as I know, it was .

Q. The word 'Bell' has always been superimposed above the word 'Wonder Chair?' A. I believe so.

Q. The wand is always stuck through with the stars on the end of it? A. Not always.

Q. Not always? A. I mean, now it is, but I don't know over the 15 year period.

Q. But you do know the word 'Bell' was always superimposed above the word 'Wonder?' A. I said I imagine. I know it is now."

See also Exhibit 9 which is typical of the use of the trademark.

The evidence establishes that appellants utilize as their trademark "Sleeper Lounge" [R69]. See Exhibits G and H. See 15 USC 1127 which defines a trademark. At one time appellants circulated advertisements such as Exhibits 16, 17 and 18 and utilized labels such as Exhibit C wherein the descriptive phrase "the Wonder Bed" was positioned below the trademark "Sleeper Lounge." The use of this phrase was entirely innocent and without any knowledge of appellee's asserted trademark [R72, 73]. This particular format was utilized for a short period of time and discontinued in August or September, 1955, in favor of advertisements of the type exemplified by Exhibit A, from which the word Wonder has been deleted [R74].

Viewing the situation in the most disadvantageous manner to appellants, the most that can be said is during the period in question appellants were using a combination mark, *i. e.*, "Sleeper Lounge the Wonder Bed." Viewing the case from this light the trial court erred in failing to apply the proper test to ascertain infringement. The trial court should look at the mark as a whole. If viewed in this manner the only similarity between "Bell Wonder Chair" and "Sleeper Lounge the Wonder Bed" resides in the descriptive word Wonder and no infringement exists. See *Judson Dunaway Corp. v. Hygienic Products Co.* (1st Cir., 1949), 178 F. 2d 461. See also Callmann *Unfair Competition and Trade-Marks*, 2nd Ed. Vol. 3, pages 1436-1437.

There is nothing in the record to establish Wonder as the dominant portion of the composite mark, indeed, the word Bell would appear to be.

It is appellants' further contention, however, that the word Wonder at no time formed a portion of its trade-

mark but was part of the descriptive phraseology utilized to describe appellants' products (15 USC 1127). It is well settled that where a party adopts a descriptive word as a trademark he cannot complain of another party using the same word in its descriptive sense. See *Hygrade Food Products Corp. v. H. D. Lee Mercantile Co.* (D. C. S. D. Kansas, 1st Div., 1930), 37 F. 2d 900, wherein it was stated:

“* * * as plaintiff's trade-mark as registered consists of a descriptive term, it is quite well settled plaintiff cannot by such means obtain a right to the exclusive use or a monopoly of the term because of the fact it is registered as a trade-mark.”

Again, in *Bliss Fabyan & Co. v. Aileen Mills, Inc.*, 25 F. 2d 370, 372, it was said:

“* * * It is settled beyond all controversy that a manufacturer has no right to the exclusive use of a descriptive word in connection with his goods and if nevertheless he adopts such a trade-mark, he, himself is largely to blame for the confusion which ensues when other manufacturers, with equal right, adopt similar terms to describe their products.”

Again, in *Spicer v. W. H. Bull Medicine Co.*, 49 F. 2d 980, quoting with approval *Kellogg Toasted Corn Flakes Co. v. Quaker Oats Co.*, 235 Fed. 657:

“Where a manufacturer establishes in a descriptive word a secondary meaning as indicating his goods, he is entitled as against another only to such protection as will prevent such other from using that term to pass off his goods as those of the original appropriator.” (p. 982.)

It is also well established that where a trademark is of such a nature that it can be used in a descriptive sense

that the use of the name must be in such a manner as is calculated to mislead the public before infringement exists and that a descriptive use of the word, even though it is someone else's trademark, is free to any merchant to use. In *Thaddeus Davids Company v. Davids*, 233 U. S. 461, 34 S. Ct. 648, 58 L. Ed. 1046, the Supreme Court said:

“In the case, therefore, of marks consisting of names or terms having a double significance, and being susceptible of legitimate uses with respect to their primary sense, the reproduction, copy, or imitation which constitutes infringement must be such as is calculated to mislead the public with respect to the origin or ownership of the goods, and thus to invade the right of the registrant to the use of the name or term as a designation of his merchandise.
* * *” (p. 470.)

In *Hunter v. F. Hoffman & Sons*, 29 F. 2d 799, it was held that:

“Appellant, therefore, having adopted a descriptive word, cannot be accorded that broad protection which would prevent others from using in other relations the same descriptive term.” (p. 800.)

In *Prestonettes, Inc. v. Coty*, 264 U. S. 359, 68 L. Ed. 731, the Supreme Court said:

“A trademark gives the right to prohibit the use of it so far as to protect the owner's good will against the sale of another's product as his. * * *
When the mark is used in a way that does not deceive the public, we see no such sanctity in the word as to prevent its being used to tell the truth.
* * *” (p. 368.)

In *Hygrade Food Products Corp. v. H. D. Lee Mercantile Co.*, *supra*, the court said, quoting with approval *Kann et al. v. Diamond Steel Co.*, 89 Fed. 706:

“* * * in all cases where a trade-mark is imitated, the essence of the wrong consists in the sale of the goods of one manufacturer or vendor as those of another, and it is only when this false representation is directly or indirectly made, and only to the extent to which it is made, that the party who appeals to the justice of the court can have a title to relief.” (37 F. 2d 901.)

Again, in *Warner & Company v. Lilly & Company*, 265 U. S. 526, 68 L. Ed. 1161, Mr. Justice Sutherland, delivering the opinion of the Court said:

“* * * The use of a similar name by another to truthfully describe his own product does not constitute a legal or moral wrong, even if its effect be to cause the public to mistake the origin or ownership of the product. * * *” (p. 528.)

An investigation of appellants' labels, Exhibit B and advertisements, Exhibits 16, 17 and 18, establishes that two subsidiary descriptive phrases are found beneath the trademark Sleeper Lounge (1) The Wonder Bed; (2) The Bed of Tomorrow for your Comfort today.

Thus the trial court erred in determining precisely what the trademarks of the respective parties were secondly in applying the appropriate test of infringement and thirdly in recognizing that any trader is free to utilize a descriptive term in its descriptive sense. No actual confusion exists [R76, 77, 78, 98, 158, 159]. The trial court improperly determined the legal standards for finding the existence of a likelihood of confusion and

failed to apply the proper legal standards for such a determination.

Since determination of confusing similarity is based solely upon the marks themselves in this case the Court of Appeals can determine this issue on appeal without necessity of remand. See *Miles Shoe, Inc. v. R. H. Macy & Co., Inc.* (2 Cir., 1952), 199 F. 2d 602, wherein the court stated:

“ . . . Where the question of confusing similarity is based solely on the marks themselves, this court has said that: ‘* * * we are in as good a position as the trial judge to determine the probability of confusion’ . . .”

In *McCormick & Co., Inc. v. B. Manischewitz Co.* (6th Cir., 1953), 206 F. 2d 744, the court holds at page 746:

“ . . . It also follows that while extrinsic facts are significant, the likelihood of confusion may as readily be perceived by a reviewing court upon visual comparison as by a court of first instance, unless extrinsic facts compel determination one way or the other.”

See also:

Best & Co. v. Miller (2d Cir., 1948), 167 F. 2d 374 and

California Fruit Growers Exchange v. Sunkist Baking Co. (7th Cir., 1948), 166 F. 2d 971.

D. Incontestability of Appellee's Mark.

Before the trial court appellee relied heavily upon the fact that its trademark had become “incontestable,” pursuant to 15 USC 1065, with the resulting consequences set forth in 15 USC 115(b).

The Trademark Act includes several important exceptions, thus in 15 USC 1065(4) it is provided:

“(4) no incontestable right shall be acquired in a mark or trade name which is the common descriptive name of any article or substance, patented or otherwise.”

Consequently, if this Court finds the word Wonder descriptive “incontestability” is of no consequence in this case. 15 USC 1115(b) provides in part:

“(b) If the right to use the registered mark has become incontestable under section 15 hereof, the certificate shall be conclusive evidence of the registrant’s exclusive right to use the registered mark in commerce on or in connection with the goods or services *specified in the certificate* subject to any conditions or limitations stated therein except when one of the following defenses or defects is established:” (Emphasis added.)

Here the goods specified in the certificate are reclining chairs and convertible chair beds. Appellants do not manufacture either of these but manufacture a bed or more precisely a mechanized substitute for a box spring and mattress [R 63, 64]. Hence “incontestability” is of no significance in this case. 15 U S C 1115(b) further provides:

“(b)(4) That the use of the name, term, or device charged to be an infringement is a use, otherwise than as a trade or service mark, of the party’s individual name in his own business, or of the individual name of anyone in privity with such party, or of a term or device which is descriptive of and used fairly and in good faith only to describe to users the goods or services of such party, or their geographic origin;”

“Wonder” as utilized by appellants is used in a descriptive sense as heretofore discussed and hence is within the express exception provided in the Statute.

In addition to the three reasons why the incontestability provisions of the Lanham Act of 1946 is inapplicable, it is submitted even if such provisions of the Act were applicable their effect would not be to expand appellee’s substantive rights.

Prior to the passage of the Lanham Act in 1946 it was well established that registration of a trademark in the Patent Office provided no substantive rights, merely procedural advantages. Thus Section 16 of the Act of 1905, Title 15 USC 96, provides that the registration of a trademark shall be *prima facie* evidence of ownership of the mark. This law is continued in Section 33(a) of the Act of 1946. It has long been debated whether the effect of the Lanham Act in 1946 was to change this well established rule. The question seems adequately answered by the Eighth Circuit Court of Appeals in *Brown & Bigelow v. B. B. Pen Co.*, 191 F. 2d 939, decided December 3, 1951, almost five years after passage of the Lanham Act:

“Neither plaintiff nor defendant has a registered trade-mark, either State or Federal, in the letters ‘B.B’ or ‘B. & B.’ That fact is not of great importance however, because as stated in *Griesedieck Western Brewery Co. v. Peoples Brewing Co.*, 8 Cir., 149 F. 2d 1019, 1022, ‘* * * the mere registration of a trade-mark does not in itself confer any greater rights than existed at common law without registration.’ Or as stated in *Best & Co. v. Miller*, 2 Cir., 167 F. 2d 374, 376, ‘* * * regis-

tration of a trade-mark confers only procedural advantages and does not enlarge the registrant's substantive rights.' ” (p. 942.)

It has been argued previously, as in the present case, that Sections 15 and 33 of the Lanham Act concerning “incontestable” rights in effect changed the law to provide substantive rights not heretofore available to a trademark owner. It has been well established law since the beginning of our system of jurisprudence that rights in a trademark are acquired through use on goods moving in commerce. Registration has merely been desirable to obtain certain procedural advantages such as, for example, the right to bring suit in a federal court under Title 28, Section 1338(a) and the presumption of ownership of the mark that has been registered. When the “incontestability” provision was suggested, numerous safeguards were inserted into the statute to avoid changing the previous law such as, for example, Section 15 has four limiting situations wherein incontestable rights cannot be obtained. Section 33 of the Act contains seven different defenses to the question of incontestability. When all of these bars and defenses to the incontestability provision are put together, it is felt that little, if anything, is left. It is difficult to imagine any set of circumstances under which the fact that a mark is “incontestable” has any bearing or any application in an infringement action. Thus it has no effect where the mark in issue is descriptive or the use of the mark in issue is as a description term. “Incontestability” is meaningless when the user adopted his mark without knowledge of the registrant's prior use prior to the date of publication. It is meaningless where the asserted infringing mark was registered and used prior to publication of the mark. Thus, it would appear

that “incontestability” when finally analyzed means that the *registrant’s right to use the trademark* in question is incontestable and it has no application in an infringement action. The Act means by “incontestability” that no one can challenge the registrant’s right to use the trademark he has registered. The Act does not give a registrant any greater rights by virtue of incontestability than he previously had under the common law when registrant endeavors to protect his trademark. It does not entitle the registrant to a broader scope of protection. This fact has been clearly brought out in the only decision that defendants have been able to find defining the effect of the “incontestability” features of the Lanham Act. Thus in *Rand McNally & Co. v. Christmas Club*, June 14, 1955, 105 USPQ 499, the Assistant Commissioner of Patents, Leeds, stated the opinion of the Patent Office concerning the effect of these provisions. Leeds is the married name of Daphne Robert, whose text “The New Trade-Mark Manual” is probably the most authoritative text on the Lanham Act and its meaning. The then Miss Robert is generally recognized as the author of the Lanham Act. With this background, the opinion of Daphne Robert Leeds, now Assistant Commissioner of Patents in charge of the Trademark Division, has additional persuasive force. In this opinion it was stated:

“These statements seem to reflect a misconception of the effect of a registration of a mark, the right to the use of which has become incontestable. The effect of ‘incontestability’ is a defensive and not an offensive effect. To put it another way, when the right to use a given mark has become incontestable, the owner’s rights in the mark are in no wise broadened, but he is free from challenges of his right to continue to use the mark to identify and

distinguish the goods recited in the registration, subject only to the defenses and defects enumerated in Section 33(b) of the statute. In the present case if respondent's right to use its mark to identify and distinguish its periodical becomes incontestable, the petitioner's rights will not be adversely affected, nor will the scope of respondent's rights be expanded. Petitioner may continue to do that which it has been doing. Both parties may continue to use the term 'Christmas Club,' in its primary sense, as the name of their Christmas savings plans, and to distribute supplies and promotion material bearing 'Christmas Club' as the identification of the plan. In addition, respondent may continue to use the mark 'Christmas Club' to identify and distinguish its periodical from periodicals of others, and it may retain its registration for a periodical. Acquisition of an incontestable right to use the mark on a periodical as a result of the filing of an affidavit in accordance with Section 15 will not provide respondent with an 'offensive weapon' of any greater magnitude than that which it has had since the registration issued in 1927." (pp. 500-501.)

Thus, it is to be noted that the drafter of the Lanham Act has defined the "incontestability" provisions as providing no offensive effect. It merely prevents someone from challenging the use of the mark by the registrant. In this present case the plaintiff is endeavoring to use the "incontestability" of its mark as an offensive weapon, claiming far greater rights than it would have had at common law.

It is, therefore, submitted that the use by appellants of the word Wonder is in a descriptive sense and does not in any way encroach upon any rights appellee may have.

Any possibility of confusion is a result of appellee's poor choice of a trademark. *Warner & Company v. Lilly & Company*, 265 U. S. 526, 68 L. Ed. 1161.

E. The Award of Damages.

The trial court awarded \$1,000.00 damages. How this figure was determined is unknown. There is no support therefor in the Findings of Fact or Conclusions of Law. The figure has no relationship whatsoever to any evidence. There was no attempt to prove actual damage at the trial [R76, 98, 158, 159]. Although the law of damages is not as precise a science as may be desired, it is still not a wild guessing game. An award of damages must bear some relationship to the evidence establishing the existence of damage. Damages in a trademark case are determined in accordance with Section 35 of the Act of 1946, 15 USC 1117. According to Daphne Robert, in her text "The New Trademark Manual" at page 218, gives three requisites to the assessment of damages:

"There appear to be three requisites in the assessment of damages:

(1) actual damage must have been sustained by the plaintiff;

(2) the damage must have been the natural and proximate result of the defendant's acts, and

(3) the unfair acts of the defendant must have been intentional."

The evidence in this case establishes no actual damage sustained by plaintiff. The record was completely absent of even an effort to prove damages in this case. Not one element of loss to the plaintiff was even attempted to be established.

Secondly, the record is completely void of any showing whatsoever that any damage, which theoretically might have been sustained, was an actual and proximate result of the defendants' acts. No effort has ever been made to establish this casual connection. Thirdly, there is no showing to the effect that the defendants' acts were intentional. Defendants were completely unaware of the existence of plaintiff's mark or his claim of any rights to the words "Wonder Chair" at the time involved. Indeed, shortly after the filing of this action the defendants ceased all use of the word "wonder" or any related terminology. Under these circumstances the mere use for a period of a few months in an advertisement and on their labels has not been established as deliberate infringement and wanton and willful disregard of plaintiff's rights. Defendants at all times acted innocently and even though they still do not believe they have in any way violated the rights of plaintiff, they have terminated any conduct which in any way could be asserted to have been an infringement of plaintiff's mark. The law is well established that the mere fact that the Court finds a trademark to have been infringed does not mean that an accounting of damages will be ordered. It is only under very special circumstances that an award of damages is appropriate in a trademark case. As set forth by the Supreme Court in *Champion Spark Plug Co. v. Sanders* (1946), 91 L. Ed. 1386, 1391:

"Mishawaka Rubber & Woolen Mfg. Co. v. S. S. Kresge Co. 316 US 203, 86 L ed 1381, 62 S Ct. 1022, states the rule governing an accounting of profits where a trade mark has been infringed and where there is a basis for finding damage to the plaintiff and profit to the infringer. But it does not stand for the proposition that an accounting will be or-

dered merely because there has been an infringement. Under the Trade Mark Act of (February 20) 1905, as under its predecessors, an accounting has been denied where an injunction will satisfy the equities of the case. *Saxlehner v. Siegel-Cooper Co.* 179 US 42, 45 L ed 77, 21 S Ct 16; *J. G. Rowley Co. v. Rowley* (CCA 3d) 193 F 390, 393; *Middleby-Marshall Oven Co. v. Williams Oven Mfg. Co.* (CCA 2d) 12 F 2d 919, 921; *Golden West Brewing Co. v. Milonas & Sons* (CCA 9th Cal) 104 F 2d 880, 882; *Hemmeter Cigar Co. v. Congress Cigar Co.* (CCA 6th Mich) 118 F 2d 64, 71, 72; *Durable Toy & Novelty Corp. v. J. Chein & Co.* (CCA 2d NY) 133 F 2d 853, 855. The same is true in case of unfair competition. *Straus v. Notaseme Hosiery Co.* 240 US 179, 181, 183, 60 L ed 590, 592, 593, 36 S Ct 288. Here, as we have noted, there has been no showing of fraud or palming off. For several years respondents apparently endeavored to comply with a cease and desist order of the Federal Trade Commission requiring them to place on the plugs and on the cartons a label revealing that the plugs were used or secondhand. Moreover, as stated by the Circuit Court of Appeals, the likelihood of damage to petitioner or profit to respondents due to any misrepresentation seems slight. In view of these various circumstances it seems to us that the injunction will satisfy the equities of the case. "Affirmed."

In other words, the Supreme Court states where an injunction will clearly satisfy the protection of the plaintiffs interests, an award of damages is inappropriate. It is submitted this is the same case as presented here. The Court has determined defendants have infringed. An injunction terminates any possibility of future infringement. There is no showing of any damages what-

soever in the record. It is felt this is a case completely inappropriate for an accounting of damages. This is the standard practice in trademark cases. An award of damages in a trademark case is an abnormal thing. The great majority of cases terminate upon the issuance of an injunction. See for example *Gemex Co. v. J. & K. Sales Co.*, 76 Fed. Supp. 150; and *Bunte Bros. v. Standard Chocolates*, D. C. Mass. 1942, 45 Fed. Supp. 478, which are offered merely as representative of decisions of this type. Consequently, in summary, it is felt that the award of \$1,000.00 damages should be stricken. The granting of damages in a case of this type is against the standard and adopted practice. It is only in a case where the three elements above outlined exist that an award of damages is appropriate. There is no proof of actual damage; there is no effort to prove actual damage and no showing that the acts of defendants were willful, deliberate, fraudulent, etc., invasion of plaintiff's trademark. Callmann, who is accepted as a leading text writer on the subject, in his text "Unfair Competition and Trade-Marks," Callmann 2d Edition, has the following statements to make concerning the awarding of damages, pages 1861 and 1862:

"If the defendant's unfair competition did not divert sales from the plaintiff, the courts refuse to order an accounting. This result is inevitable when there can be no such diversion of sales because the parties were not in competition and when the defendant's profits are unconnected with his unfair competition. And similarly, when the plaintiff trade-mark owner had transferred to another those rights from the exercise of which the profits arose, or when the account is sought solely to determine compensation on the basis of unjust enrichment, an

order for an accounting will be properly denied. To recover the infringer's profits the trade-mark owner need not establish that the parties compete in same market, nor will recovery be denied because one party sells gin and the other whiskey; such goods compete in the same general field and the sales of one may well have an appreciable effect upon the sales of the other. But the contention that there was no confusion of goods and, therefore, no passing off, should be differently considered, for this goes to the merits of the case. Where the confusing similarity of trade-marks is the exclusive issue an account is properly refused. Decisions hold that an accounting cannot be granted where there is no evidence of actual confusion and diversion of sales from the plaintiff."

and also on page 1868 wherein the author states:

"Damages are not recoverable nor, according to the weight of authority, is the right to an accounting of profits available in an action for unfair competition except upon proof of the defendant's wrongful intent. Thus in a trade-mark case 'there can be no recovery unless the court is satisfied that there has been an intent on the part of defendants to palm off their goods as plaintiff's' The malicious intent without resulting injury does not warrant recovery."

Again, the author states on pages 1870 and 1871:

"If the defendant reasonably believes, or has been informed by experts, that he is not violating the plaintiff's rights or that the plaintiff does not have the right he claims, knowledge thereof, whether acquired at the outset or after an innocent beginning, e. g., through notice or suit, does not import knowledge of unlawfulness."

Thus the award of damages should be reversed for two reasons. First, this is not an appropriate case for such an award, appellants having acted innocently and second, the \$1,000.00 awarded is completely unsupported by the evidence or by the Findings of Fact and Conclusions of Law.

F. The award of \$500.00 Attorneys' Fees.

Attorneys' fees *per se* cannot be awarded in a trademark case.

It is well established that a Court has no authority to grant counsel fees except where a statute expressly provides. There is no authority in the Lanham Act for the granting of attorneys' fees. The law concerning the awarding of attorneys' fees is well summarized in Callmann in "Unfair Competition and Trade-Marks," 2d Edition, page 1902, wherein this recognized authority in the field states:

"Accordingly, both in federal and state courts, it is well established in law and almost uniformly settled in equity that counsel fees can not be recovered. Exceptions are carved by statute in copyright and patent cases where the court *may* allow reasonable attorney fees to the prevailing party, and an exception may be recognized if there is an agreement to the contrary, or statutory sanction, e.g., where costs are recoverable in specific cases. This has been allowed in actions to enforce orders of the Interstate Commerce Commission, and in suits based on violation of the anti-trust laws. But counsel fees incurred by the plaintiff in an action for trademark infringement are not recoverable."

The courts have also stated in trademark cases that attorney's fees are not recoverable. See *Gold Dust Cor-*

poration v. Hoffenberg (2 Cir., 1937), 87 F. 2d 451, wherein the Court states at page 453:

“Both in federal and state courts it is established in actions at law and almost uniformly settled in equity cases that counsel fees may not be recovered. *Oelrichs v. Spain*, *supra*. See *Marks v. Leo Feist, Inc.*, *supra*. Exceptions are made if authorized by statute (see, for example, 1 N. J. Comp. Stat. 1910, p. 445, § 91; *Diocese v. Toman* (N. J. Ch.) 70 A. 881), as where costs are made recoverable in specific types of cases.”

See also *United Pac. Ins. Co. v. Northwestern Nat. Ins. Co.* (10 Cir., 1950), 185 F. 2d 443, wherein the Court stated page 448:

“The right to recover attorney’s fees as part of the the cost of an action did not exist at common law. In the absence of an agreement, the right thereto is purely statutory.”

In those cases where attorneys’ fees have been awarded as part of punitive damages the elements warranting an award of punitive damages were present. Here the Findings of Fact and Conclusions of Law do not support such an award. Again, this Court’s attention is drawn to the fact that appellants were unaware of appellee’s asserted rights at the time the word Wonder was utilized [R72, 73] and ceased utilizing the word shortly after this suit was commenced [R74].

In conclusion it is respectfully submitted that the Trial Court erred in the following respects:

(1) Concluding that the trademark “Wonder Chair” is arbitrary and distinctive and constituted a valid technical trademark. To the contrary, the Court should have

determined that mark "Wonder Chair" is descriptive and incapable of becoming a valid trademark in the absence of proof of secondary meaning, there being no effort to prove the existence of a secondary meaning.

(2) Concluding that "Wonder Chair" was a strong trademark and entitled to a broad scope of protection. To the contrary, the Trial Court should have concluded that "Wonder Chair" if valid at all, was a weak mark entitled to extremely limited protection and was entitled to no protection in the present instance, that the mark used by appellants is entirely different in sound, meaning and appearance, that it is used on different goods moving in entirely different channels of trade, that is, where the goods are custom made at appellants' place of business in accordance with customer's requirements.

(3) Concluding that appellants use of the word "Wonder" constituted an infringement of appellee's rights. To the contrary, the Court should have concluded that appellants' use of the word "Wonder" was descriptive and did not constitute a trademark use of the phrase. The Trial Court should have determined precisely what the marks of the respective parties were and comparing same as a whole should have determined that appellants' trademark "SLEEPER LOUNGE" or "SLEEPER LOUNGE THE WONDER BED" cannot in any sense constitute an infringement of appellee's trademark "BELL WONDER CHAIR" or "WONDER CHAIR."

(4) The award of damages and award of attorneys' fees in this case are contrary to all legal standards set up by the Courts. In both instances the award of any amount is contrary to law, there being no proof in the

record to support the fact of damage let alone the amount thereof, and of course, the award of attorneys' fees *per se* is not permissive in a case of this type.

It is, therefore, respectfully submitted that the Trial Court should be reversed in all respects.

SLEEPER LOUNGE COMPANY, *et al.*,
Appellants.

LYON & LYON,
By R. DOUGLAS LYON,
Their Attorneys.

No. 15495

United States
Court of Appeals
for the Ninth Circuit

SLEEPER LOUNGE COMPANY, a Co-partnership Consisting of Charles Kunzelman and James A. Anderson; CHARLES KUNZELMAN and JAMES A. ANDERSON,

Appellants,

vs.

BELL MANUFACTURING COMPANY, a Corporation,

Appellee.

Supplemental
Transcript of Record

Appeal from the United States District Court for the
Southern District of California
Central Division.

FILE

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PAUL P. O'BRIEN,

No. 15495

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SLEEPER LOUNGE COMPANY, a Co-partnership Consisting of Charles Kunzelman and James A. Anderson; CHARLES KUNZELMAN and JAMES A. ANDERSON,

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Supplemental
Transcript of Record

**Appeal from the United States District Court for the
Southern District of California
Central Division.**

In the United States District Court, Southern
District of California, Central Division

No. 17,779-TC—Civil

BELL MANUFACTURING COMPANY.

Plaintiff,

vs.

SLEEPER LOUNGE CO., a Co-Partnership, Con-
sisting of Charles Kunzelman and James A.
Anderson,

Defendants.

Honorable Thurmond Clarke, Judge, Presiding.

REPORTER'S PARTIAL TRANSCRIPT
OF PROCEEDINGS

Appearances:

For the Plaintiff:

ADELBERT SCHAPP and
ELLIOTT & PASTORIZA, by
WILLIAM J. ELLIOTT.

For the Defendants:

LYON & LYON, by
R. DOUGLAS LYON.

HAROLD JOHN MILLER

called as a witness for the plaintiff, being first duly sworn, was examined and testified as follows:

The Clerk: State your full name, please.

The Witness: Harold John Miller.

Direct Examination

By Mr. Schapp:

Q. Mr. Miller, will you please give your full name? A. Harold John Miller.

Q. Your age? A. 56.

Q. Your residence?

A. 825 Geary Street, San Francisco.

The Court: That is your office, isn't it?

The Witness: No; that is my home. I have an apartment.

The Court: Oh, I see.

The Witness: Two blocks from the office.

Q. (By Mr. Schapp): Your occupation?

A. President, Bell Manufacturing Company.

Q. You are president at the present time. How long have you been president of the Bell Manufacturing Company? [3*]

A. Since November of last year.

Q. How long have you been connected with the plaintiff corporation?

A. About 15 or 16 years.

Q. About 16 years? A. 15 years.

Q. At the time you joined the organization, what was its legal structure?

*Page numbering appearing at top of page of original Reporter's Transcript of Record.

(Testimony of Harold John Miller.)

A. It was a partnership.

Q. A co-partnership? A. Co-partnership.

Q. Do you remember the names of the partners?

A. Joseph D. Bell and Pearl B. Taylor.

Q. And has there been any change in the legal structure?

A. The co-partnership reverted to a corporation in 1947.

Q. And the corporation took over all the assets of the co-partnership? A. That is right.

Q. Was there any change in the relationship between the two partners?

A. Well, they just became officers in the corporation.

Q. They became officers in the corporation, but in their personal relationship? [4]

A. They were eventually married in 1948.

Q. So Miss Taylor became Mrs. Bell afterward?

A. Yes.

Q. And those two names that are used mean the same person? A. That is right.

Q. How long have you known Mr. Bell?

A. I met him in 1915.

Q. 1915? A. Yes.

Q. Can you relate the circumstances under which you met him?

A. Yes. He manufactured a certain bed-davenport device, and the department I was in purchased 9,000 of them, and I met him in the course of the negotiation then, in the use of the device.

(Testimony of Harold John Miller.)

Q. Mr. Bell was in the furniture business at that time?

A. He manufactured this bed-davenport device.

Q. What became of the two partners?

A. Well, they both died—Mr. Bell in 1951 and Mrs. Bell just a few months ago.

Q. Where is your place located in San Francisco? A. 1020 Geary Street.

Q. Have you got any branches? [5]

A. Yes, we have. We have a branch in Oakland, in San Jose, two in Los Angeles, one in Pasadena.

Q. Will you please identify the two branches in Los Angeles?

A. One is at 1001 South Hill, and the other is at 4076 South Crenshaw Boulevard.

Q. Do you happen to know the location of the defendant?

A. I have an idea that it is on Wilshire, I understand, in the 3000 block, I understand.

Q. Is that somewhere in the neighborhood of any one of your stores?

A. I think it is about 20 or 25 blocks from one of our stores. I believe it is nearest the Crenshaw store.

Q. What kind of goods does the plaintiff manufacture?

A. Well, we make convertible furniture: Bed-chair, convertible bed-davenports, lounging chairs, heart-rest chairs.

Q. I call your attention to a chair standing here; is that an article of your manufacture?

(Testimony of Harold John Miller.)

A. That is our Wonder Chair.

Q. Will you please explain the construction and operation of this chair?

A. Well, it is essentially a mattress——

Q. Better come over here.

A. ——contained within the frame (stepping down from [6] the witness stand).

Mr. Schapp: Talk loud enough for the reporter here.

The Court: Shall we call the chair Plaintiff's Exhibit 1, for the record? Is that satisfactory?

Mr. Schapp: Exhibit 1.

The Court: Plaintiff's Exhibit 1.

Mr. Schapp: Yes.

The Witness: First, it is a chair, and then it is also a relaxing unit. In other words, you can fit in the chair and——

The Court: Wait a minute. We will refer to it as Exhibit 1.

Mr. Lyon: Do you intend to put the chair in evidence or make some photographs of it?

The Court: Use it for the purpose of illustration.

Mr. Schapp: Yes, for the purpose of illustration.

The Court: We will call it Exhibit 1 for the purpose of illustration. Is that satisfactory?

Mr. Lyon: That is fine. Do you intend to put anything by way of photographs or anything else—or drawings of this item in evidence?

Mr. Schapp: No, except in our advertising—it appears in our advertising.

(Testimony of Harold John Miller.)

Mr. Lyon: As it shows in your advertising.

Mr. Schapp: The same chair appears in most of our [7] advertising.

(The chair referred to was marked Plaintiff's Exhibit 1 for the purposes of illustration.)

The Witness: You see, this by body movement will go to any position. I think there are distinctly about a hundred positions you can arrive at. It is a matter of body movement. There are no gadgets on this thing. And then it converts into a bed.

Q. (By Mr. Schapp): Will you please convert it into a bed?

A. Yes, it takes just a moment (a pause while the witness complies with counsel's request). Also, it can be converted into a lounge, too, by putting it in this position, for lounging and relaxation, and for televiewing, too. This is very good for televiewing.

The Court: Do you want him to resume the stand now, or——

Mr. Schapp: Well, we might.

You might resume your witness chair, now.

(The witness resuming the witness stand.)

Q. (By Mr. Schapp): How long have you been—has your concern been selling these chairs?

A. I think in 1938 was the first sale of that particular chair.

Q. Since '38. Does Bell Manufacturing Company

(Testimony of Harold John Miller.)

manufacture and sell any other chairs of similar character? [8]

A. Well, we make another type, our so-called Heart-Rest Chair, and this we widen out and make into a love seat, and then we combine two of these in one housing—we call it a twin recliner.

We make a bed-davenport that converts. There are two bed-davenports that convert.

Q. And are those, then, sold under the name——

A. We use the term “Wonder” in conjunction with all of those, yes.

Q. Wonder Chair. Is this chair and some of the other chairs you are selling of conventional character? A. What do you mean? As a chair?

Q. Yes. A. Well, I would say so.

Q. Is there anything unusual about it?

A. Well, the fact that it converts and makes into a bed. To my knowledge, it is very unusual and unique.

Q. Who developed that chair?

A. Mr. Joseph Bell.

Q. Mr. Joseph D. Bell. Did he get any patents on this chair and the particular chairs?

A. Yes.

Q. Have you got any idea about how many patents he took out on chairs of this character?

A. Well, I think all told about 17. Out of 38 patents, [9] I think 17 pertain to chairs and convertible beds.

Q. I will show you a volume of books entitled

(Testimony of Harold John Miller.)

“Joseph D. Bell’s Patented Inventions, 1913 to 1947.”

Mr. Lyon: May I see that, please?

(Mr. Schapp showing the document to Mr. Lyon.)

Q. (By Mr. Schapp): I will ask you to identify that book (handing the document to the witness).

A. Yes, this is his book. Did you want this (referring to a paper)?

Mr. Schapp: No.

The Court: Just put that in your pocket.

The Witness: Yes, this is his book.

Mr. Schapp: This book contains about 34 or 35 patents, and approximately 20 of these patents—they were all issued to Mr. Bell, and Mr. Bell made up this book.

Mr. Lyon: Your Honor, I would like to object to counsel testifying.

The Court: He just wants to put the book in evidence.

Mr. Schapp: Yes.

The Court: The book speaks for itself.

Mr. Schapp: Yes.

Mr. Lyon: I would like to object to the entry of the book in evidence, your Honor. I don’t see its materiality or relevancy to the issues in this case at all. I just don’t like to see the record get built up. I don’t see its purpose. [10]

The Court: Well, I will overrule the objection

(Testimony of Harold John Miller.)

and allow it to be received as Plaintiff's Exhibit 2 in evidence.

Mr. Schapp: All right.

(The exhibit referred to was marked Plaintiff's Exhibit 2 and was received in evidence.)

The Court: You may read any portion of it you want, rather than you stating what it contains. That is what counsel objected to, to your stating your conclusion.

Mr. Schapp: All right, your Honor.

The Court: Or you may call the court's attention to any particular pages you want and put that in the record and the court will read it.

Mr. Schapp: For the record, I have prepared a list of all these patents that relate to bed structures, etc., and perhaps counsel will stipulate that I may incorporate that list in the record.

Mr. Lyon: May I see the list?

(Mr. Schapp showing the document to Mr. Lyon.)

Mr. Lyon: I haven't had a chance to check this, your Honor, but I will take counsel's word that it is.

I of course object to the entry of a portion of the book as being irrelevant and immaterial on the same basis as before.

The Court: I will overrule the objection and let it be Exhibit 3. We will take Mr. Schapp's word for it. [11]

(Testimony of Harold John Miller.)

(The exhibit referred to was marked Plaintiff's Exhibit 3 and was received in evidence.)

Mr. Schapp: Shall I read this into the record, your Honor?

The Court: Yes, read it into the record.

Mr. Schapp (Reading): "Patents relating directly to convertible chair-beds:

"1,166,315, combined bed and seat, December 28, 1915;

"1,366,112, davenport-bed, January 18, 1921;

"1,488,144, sofa-bedstead, March 25, 1924;

"1,789,094, davenport, January 13, 1931;

"1,800,496, davenport only, April 14, 1931;

"2,120,962, twin bed couch, June 21, 1938;

"2,173,641, convertible couch, September 19, 1939;

"2,240,204, chair bed, April 29, 1941;

"2,249,266, combined chair and bed, July 15, 1941;

"2,270,576, divan bed, January 20, 1942;

"2,279,286, divan bed, April 7, 1942;

"2,281,085, chair-bed, April 28, 1942;

"2,286,948, chair-bed, June 16, 1942;

"2,287,596, chair-bed, June 23, 1942;

"2,288,775, reclining chair, July 7, 1942;

"2,293,964, chair-bed, August 25, 1942;

"2,304,298, chair-bed, December 8, 1942;

"2,326,196, convertible bed, August 10, 1943; [12]

"2,328,254, chair-bed, August 31, 1943;

"2,328,255, chair-bed, August 31, 1943."

(Testimony of Harold John Miller.)

Those are the numbers of the patents secured by Mr. Bell.

Should I leave the book?

The Court: Yes, the book is in evidence.

The Clerk: The book is Exhibit 2, and the list is Exhibit 3.

Q. (By Mr. Schapp): Now, Mr. Miller, is your chair, this particular chair that the Bell Manufacturing Company manufactures different from any other chair in the market, as far as you know?

A. Well, it is unique, as I was saying. It converts into lounges and relaxes, all combined in one chair.

Q. Do you know whether the validity of the present patents I just referred to has ever been questioned? A. No.

Q. Has Mrs. Bell ever been forced to resort to a patent suit, as far as you know? A. No.

Q. Now, Mr. Miller, are you using any trademark in connection with this chair?

A. We use the term or the mark "Wonder Chair."

Q. How long have you been using that trademark?

A. It seems to me since 1938—1938.

Q. Since 1938? [13] A. Yes.

Q. And you have used it ever since?

A. Oh, yes.

Q. Have you used it in interstate trade ever since? A. Yes.

(Testimony of Harold John Miller.)

Q. Do you use it on any other pieces of furniture?

A. Well, as I inferred, we use it on our Wonder Love Seat, Wonder Twin Recliner, Wonder Cushion Davenport, and Wonder Bed-Davenport, in addition to the Wonder Chair.

Q. As far as you know, since you began using the trade-mark "Wonder Chair," has this trade-mark ever been infringed?

Mr. Lyon: Your Honor, I object; that is calling for an opinion. That is what the court is here to decide.

The Court: Yes; I will sustain the objection.

Mr. Schapp: May I reword the question, your Honor?

The Court: Yes, sir.

Q. (By Mr. Schapp): Has any infringement of your trade-mark ever been brought to your attention?

Mr. Lyon: Same objection, your Honor.

The Court: I will overrule the objection. He may answer that.

The Witness: No.

Mr. Schapp: You overruled the objection?

The Court: Yes. [14]

The Witness: No.

Q. (By Mr. Schapp): Have these chairs always carried that trade-mark by way of labels?

A. Oh, yes.

Q. They have always been identified by the label?

A. Yes.

(Testimony of Harold John Miller.)

Q. Now, have you done any advertising in connection with this chair and similar chairs?

A. Yes; over the years we have.

Q. I wish to bring to your attention what purports to be a sheet of the Los Angeles Examiner of Sunday, September 18, 1938. Will you kindly pick up this paper and see whether you find any of your advertisements in that paper (placing document before the witness)?

A. Yes.

Mr. Schapp: Do you want to see it?

Mr. Lyon: Please.

(Mr. Schapp showing the document to Mr. Lyon.)

Mr. Lyon: Do you have a copy of that?

Mr. Schapp: I am afraid not.

The Court: Do you want to put that in evidence?

Mr. Schapp: Yes, please. May I introduce this in evidence as——

The Court: Yes.

The Clerk: Plaintiff's Exhibit 4. [15]

Mr. Lyon: No objection.

(The exhibit referred to was marked Plaintiff's Exhibit 4 and was received in evidence.)

Q. (By Mr. Schapp): I now call your attention to a card and will ask you to identify the same.

A. Yes; that's ours.

Q. What is it?

A. It's a card announcing the catalog to be issued in 1940.

(Testimony of Harold John Miller.)

Q. That was issued by your concern?

A. Oh, yes.

Mr. Schapp: I ask that this be introduced in evidence.

Mr. Lyon: May I see it first, please?

(Mr. Schapp showing the document to Mr. Lyon.)

Mr. Lyon: No objection.

The Clerk: Plaintiff's Exhibit No. 5.

(The exhibit referred to was marked Plaintiff's Exhibit 5 and was received in evidence.)

Q. (By Mr. Schapp): Now, I will show you a folder here and I will ask you to let us have your comment on that.

A. Yes; this is ours. We called this a catalog at the time.

Q. Do you remember when that catalog was published?

A. Well, of course, I came there in '41, June, 1941. Yes. I think I came in August. Well, I used this catalog [16] in 1941 myself.

Q. 1941? A. Yes.

Q. And according to your best recollection, how long have you been using that catalog?

A. This particular catalog, this type, I think, we used up to about 1947.

Q. You used that for six years?

A. Approximately. We had about 10,000 a year printed, if I remember correctly.

(Testimony of Harold John Miller.)

Q. Did you print these in large quantities?

A. About 10,000 a year, if I remember correctly.

Q. About 10,000 a year? A. Yes.

Q. Does this feature the trade-mark "Wonder Chair"? A. Why, yes. I think it's in there.

Q. (Handing the document to the witness.)

A. Yes; "Bell's Wonder Chair."

Mr. Schapp: May I ask that this be introduced in evidence as an exhibit?

The Court: Plaintiff's 6.

Mr. Lyon: No objection.

(The exhibit referred to was marked Plaintiff's Exhibit 6 and was received in evidence.)

Q. (By Mr. Schapp): Here is an excerpt from a paper. [17] I wish you would identify it, if you can (handing document to the witness).

A. Yes; this is one of our ads.

Q. What is that?

A. I believe, offhand, this was a 1941 ad—"Bell's Wonder Chair"—'41, I believe.

Mr. Schapp: I will introduce this in evidence and ask that it be marked, your Honor.

The Clerk: Plaintiff's Exhibit 7.

Mr. Lyon: No objection.

(The exhibit referred to was marked Plaintiff's Exhibit 7 and was received in evidence.)

Q. (By Mr. Schapp): Here is another Sunday Examiner, apparently. I wish you would identify that.

(Testimony of Harold John Miller.)

A. Yes; this is one of our ads—"Bell Wonder Chair." This is '41, too, I believe. It has our Sacramento address there. We discontinued that store in 1941.

Mr. Schapp: I will ask that this be introduced in evidence as plaintiff's exhibit.

The Clerk: Plaintiff's Exhibit 8.

Mr. Lyon: Your Honor, this is becoming a little cumulative. I wonder if I can ascertain, counsel, the purpose. Then maybe we can dispose of this by way of stipulation rather than putting in all these repetitive ads of the same nature. If you want to, go ahead; but I think we might [18] dispose of the matter if I can find out why you are putting them all in.

Mr. Schapp: Yes; to show the continued history of advertising.

Mr. Lyon: I am willing to stipulate that they used the trade-mark and used it continuously since the date stated in the registration, if that will help you.

Mr. Schapp: You will stipulate——

Mr. Lyon: I will stipulate that you have used the trade-mark "Wonder Chair" and that you have used it continuously since 1938.

Mr. Schapp: All right, thank you, very much. Then I will confine myself to this one volume here, which apparently is the latest.

Q. Will you please identify that folder (handing document to the witness)?

A. Yes. This is our latest catalog, 1955 catalog.

(Testimony of Harold John Miller.)

Q. Does that feature the trade-mark "Wonder Chair"?

A. Yes, it does.

Mr. Schapp: I can furnish you a copy of this, counsel.

Mr. Lyon: Thank you, very much.

The Court: Would you like to put that in the record, too?

Mr. Schapp: Yes.

The Court: All right. [19]

Mr. Schapp: I will ask that this be marked Plaintiff's Exhibit—

The Clerk: No. 9.

(The exhibits referred to were marked Plaintiff's Exhibits 8 and 9 and were received in evidence.)

Q. (By Mr. Schapp): Do you remember the amount of money you spent on advertising, approximately?

A. In 1954 we spent in the neighborhood of \$60,000 a year, and in 1955 I imagine it will be about \$50,000.

Q. Have you used any newspapers to any extent for advertising?

A. Yes; essentially newspapers.

Q. Would you please give us your best recollection, approximately, what newspapers you have used for advertising?

A. Well, we use the San Francisco Examiner, the San Francisco Chronicle, the Los Angeles Times magazine section, home magazine section, the Los

(Testimony of Harold John Miller.)

Angeles Examiner, the San Jose Mercury-Herald, San Jose Shopping News, Oakland Tribune. I think that is about it in the way of newspapers.

Q. I now show you an issue of the Los Angeles Times of October 17, 1954, and I will call your attention to page 45 of that magazine (handing document to the witness).

A. Yes, that is our ad—"Bell Wonder Chair."

Q. I also call your attention to page 54 of that magazine and see what you discover there. [20]

A. That's the Sleeper Lounge, the Wonder Sleeper Lounge ad.

Mr. Schapp: This evidence is introduced principally for the purpose of showing that both used the same advertising media, both in the Sunday issue of the Los Angeles Times.

Mr. Lyon: No objection.

The Clerk: Plaintiff's Exhibit 10.

Mr. Schapp: I introduce this in evidence as Plaintiff's Exhibit 10.

(The exhibit referred to was marked Plaintiff's Exhibit 10 and was received in evidence.)

Mr. Schapp: Will you stipulate that the answer to Interrogatory 10 may go into evidence, without reciting it?

Mr. Lyon: Our answer to Interrogatory 10?

Mr. Schapp: No; our answer to your Interrogatory 10.

Mr. Lyon: I will not stipulate that your answer to our interrogatories can go in; no, sir.

(Testimony of Harold John Miller.)

Q. (By Mr. Schapp): Mr. Miller, at one time during this proceeding you filed answers to certain interrogatories propounded by the defendant?

A. Yes.

Q. And I wish to call your particular attention to Interrogatory No. 10, which calls for—

“Please list in detail and identify each and [21] every form of advertisement or sales media, including but not limited to brochures, other literature, television, radio, billboards, other sign displays, pamphlets, newspapers and the like, in which you have used the phrase ‘Wonder Chair,’ setting forth further when each was commenced, how long each has or did continue, and when each use was stopped, if stopped before the commencement of the above-entitled action.”

Do you remember that you prepared an answer to this interrogatory? A. Yes, I do.

Q. Did you personally collect that data on which you— A. It seems to me I did.

Mr. Schapp: May I read the answers?

The Court: Yes.

Mr. Lyon: Your Honor, I am not going to object to the introduction of this particular answer. It is objectionable as being a self-serving declaration, but I don't want my silence to be interpreted as admitting the admissibility of any other answers.

The Court: All right. I will overrule the objection. You may read it.

Mr. Schapp: “Answer: (1) Catalogs from at least 1940 to the present;

(Testimony of Harold John Miller.)

“(2) Los Angeles Times Magazine Section [22] from approximately 1951 to the present;

“(3) Oakland Tribune from at least 1940 to the present”;

(Reporter’s note: No. 5 was not read.)

“(6) San Jose Mercury-Herald, for about one year to the present;

“(7) San Jose Shopping News for about one year to the present;

“(8) Los Angeles Examiner from 1938 to the present;

“(9) Radio, San Jose and Salinas, for about six months to the present;

“(10) Radio, San Francisco, Fulton Lewis, Jr., from 1948 to 1951;

“(11) Radio, Los Angeles, Fulton Lewis, Jr., for one month in 1951;

“(12) Television, Northern California, approximately from 1949 to 1954.”

Are those answers correct, to the best of your knowledge? A. That is right.

Q. Do you happen to remember how much you paid Fulton Lewis, Jr.?

A. I think that program used to cost us about \$1,600 a month, and then when we added Los Angeles it was \$5,000 a month.

Mr. Schapp: Thank you. [23]

Now, your Honor please, I desire to introduce in evidence some official documents.

Do you want to see these?

(Testimony of Harold John Miller.)

Mr. Lyon: I have seen them.

Mr. Schapp: This is Trade-mark Certificate No. 377752, issued by the United States Patent Office to Bell Manufacturing Company of San Francisco on the 14th day of May, 1940. The certificate especially provides that it was issued under the act of February 20, 1905, and the certificate also provides——

Mr. Lyon: Your Honor, the document speaks for itself, I believe.

The Court: Well, I will——

Mr. Lyon: If he wants to introduce it in evidence, let him introduce it.

The Court: Well, certain counsel have a certain way they like to do things. I will let him proceed.

Mr. Schapp: Thank you.

The Court: Maybe that is the way they do it in San Francisco, in other words.

Mr. Schapp: The certificate also provides that the word "chair" is disclaimed apart from the mark as shown, which accentuates the idea of the word "Wonder." I ask that this be introduced in evidence as——

The Clerk: Plaintiff's Exhibit 11. [24]

Mr. Schapp: ——Plaintiff's Exhibit 11. I also wish to introduce in evidence an assignment (showing document to Mr. Lyon).

Mr. Lyon: Your Honor, we will stipulate that the plaintiff corporation is the owner of the registration, to save them the trouble of introducing that, if they like.

Mr. Schapp: Thank you, very much.

(Testimony of Harold John Miller.)

The Court: All right.

Mr. Schapp: Next I desire to introduce in evidence a file wrapper, a copy of the file wrapper as it exists at the present time in the United States Patent Office. This file wrapper is introduced principally for the purpose of showing that all the necessary steps have been taken to secure the incontestability of the trade-mark under the 1946 Act.

The Court: All right.

Mr. Schapp: I wish to introduce this in evidence.

The Clerk: Plaintiff's Exhibit 11.

Mr. Schapp: As Plaintiff's Exhibit 11.

(The exhibit referred to was marked Plaintiff's Exhibit 11 and was received in evidence.)

Mr. Schapp: And I would like to call your Honor's attention to a few pages here, if I may.

The Court: Certainly.

Mr. Schapp: The prosecution of the case has been of the normal kind, but it should be noted that the Patent Office, [25] when this application was filed, apparently found no record in its own records against his application where the word "Wonder" played any part, so as to deny registration to the applicant, Bell Manufacturing Company.

Then I wish to call your Honor's attention to page 9—that's the official counting of pages by the Patent Office—page 9, which gives a copy of the affidavit under Section 12(c), reading as follows:

"Joseph D. Bell, being duly sworn, deposes and says that he is a member of the Bell Manufacturing

(Testimony of Harold John Miller.)

Company, a copartnership, and owner of Registration No. 377752, above identified, as evidenced by the accompanying title report * * *”—the title report filed with it.

“* * * that said registration is now in force; that the trade-mark described therein is in use in commerce among the several states on each of the following goods named in said registration, reclining chairs and convertible chair-beds, in Class 32 furniture and upholstery, and claims the benefits of the Trade-mark Act of 1946 for said trade-mark.”

That brings it officially within the Act of 1946.

Mr. Lyon: Your Honor, I will object to the introduction of that affidavit, unless it is solely for the purpose of proving that such affidavit was filed. If it is offered for [26] the purpose of proving the facts stated therein, I have not had an opportunity to cross-examine the affiant and I do not believe it is admissible. It is hearsay.

Mr. Schapp: That is perfectly satisfactory.

The Court: All right.

Q. (By Mr. Schapp): Mr. Miller, you are familiar with the history of Bell Manufacturing Company? A. Yes.

Q. At the time of the filing of this affidavit, which was on the 26th day of September, 1947, was the trade-mark in use in commerce at that time by the Bell Manufacturing Company? A. Yes.

Mr. Lyon: I believe I have already stipulated that it has been continuously used, if that is your purpose.

(Testimony of Harold John Miller.)

Mr. Schapp: Beg your pardon?

Mr. Lyon: I say, I believe I have already stipulated that you have continuously used the mark, if that is the purpose.

Mr. Schapp: Yes; I just want to get evidence that the statements in this affidavit are supported by additional testimony.

The Court: All right.

Mr. Schapp: In fact, that will be all that is necessary on that part of it. [27]

Then I wish to call attention to page 12 of the record, in which the Patent Office notifies Bell Manufacturing Company that the trade-mark was republished in the Official Gazette on September 14, 1948.

That is the final step to bring it within the 1946 Act. The law provides that after getting under the 1946 Act, after the expiration of five years, you are supposed to file another affidavit, a combined affidavit, under Sections 5 and 8 and 15, and this was duly filed and recorded on page 18 and page 19 of the records of the Patent Office; and in this affidavit Pearl B. Bell swears that said corporation is the owner of Registration No. 377752 and republished on September 14, 1948, as evidenced by the accompanying title report; that the mark described therein has been in continuous use in commerce among the several states for five consecutive years.

Q. Can you testify to that, that it has been in continuous use for the five consecutive years prior to the filing of this affidavit? A. Yes.

(Testimony of Harold John Miller.)

Mr. Schapp: That from September 14, 1948, to the date of this affidavit, subsequent to the date of application, on or in connection with the following goods: Reclining chairs and convertible chair beds, as stated in the registration.

Q. Do you find all those facts to be true? [28]

A. That is right.

Mr. Schapp: That the mark is still in use in commerce among the several states.

Q. Was that true at that time?

A. That is right.

Mr. Schapp: And in connection with said reclining chairs and convertible chair-beds—was that true? A. That is right.

Q. As evidenced by the specimen filed herewith, which is in use on said goods at the present time.

Now, I have to ask you a few more questions.

That there has been no final decision adverse to said corporation's claim of ownership of said mark for such goods?

The Witness: No.

Q. (By Mr. Schapp): At that time there had been no final decision? A. That is right.

Q. Or its right to register the same?

A. No.

Mr. Schapp: Speak out loud so that the reporter can hear you.

The Witness: No, sir.

Q. (By Mr. Schapp): Or to keep the same on the register? A. No, sir.

Q. And that there is no proceeding involving

(Testimony of Harold John Miller.)

said [29] rights pending in the Patent Office or in court and that finally disposed of? A. No.

Q. There was no proceeding pending at that time? A. No.

Mr. Schapp: Now, I wish to call attention to page 20, which is official notice from the patent office that the combined affidavit under Sections 8 and 15 has been duly filed and approved and found acceptable.

Did I offer this in evidence?

(Mr. Schapp handing the document to the clerk.)

Mr. Lyon: Your Honor, I believe this is the first offering of that, and I would not object to its admissibility for the purpose of showing that the steps have been complied with in the Patent Office; but I do object if it is offered for the purpose of proving the truth of any of the averments of the affidavit, on the grounds that they are self-serving declarations and merely hearsay.

The Court: He wanted to prove the various steps in the Patent Office.

Mr. Lyon: If that is the only purpose, I have no objection. I don't want to admit any of the facts alleged in there are actual facts.

Mr. Schapp: You are not asked to admit anything. I just asked Mr. Miller whether those facts were true. [30]

The Court: I will allow it to be received.

Mr. Schapp: Thank you.

(Testimony of Harold John Miller.)

The Clerk: Plaintiff's Exhibit 12.

(The exhibit referred to was marked Plaintiff's Exhibit 12 and was received in evidence.)

Mr. Schapp: I now desire to introduce in evidence a copy of "Huntington Hartford Theatre" and wish to call attention to page 26, which shows an advertisement of the Sleeper-Lounge bed, with the words "Wonder Bed" displayed, as appears from the advertisement. The advertisement carries the notations in ink and I will ask that those notations be disregarded.

Mr. Lyon: No objection.

Mr. Schapp: I understand counsel is willing to stipulate that this may be introduced.

Mr. Lyon: No objection.

The Court: All right, it may be received.

The Clerk: Plaintiff's Exhibit 13.

(The exhibit referred to was marked Plaintiff's Exhibit 13 and was received in evidence.)

Mr. Schapp: I have another copy of the same magazine. I further wish to introduce in evidence another copy of the "Huntington Hartford Theatre," page 22, which shows a similar advertisement.

Mr. Lyon: For your information, this is formally known [31] as "The Play-Goer." It is a magazine that is put out in this town for our local theatre. I think it would be properly clear in the record if you refer to it as that.

The Court: Play-Goer?

(Testimony of Harold John Miller.)

Mr. Lyon: Yes.

Mr. Schapp: Counsel calls my attention to the fact that these two magazines should be referred to as "The Play-Goer."

The Clerk: Plaintiff's Exhibit 14.

(The exhibit referred to was marked Plaintiff's Exhibit 14 and was received in evidence.)

Mr. Schapp: Next I desire to introduce in evidence another advertisement, being a photograph of a billboard, carrying the sleeper-lounge ad.

Mr. Lyon: May I ask when that photograph was taken? Do you know, counsel?

Mr. Elliott: Approximately two months ago.

Mr. Lyon: Approximately two months ago. No objection.

Mr. Schapp: I ask that this be introduced.

The Clerk: Plaintiff's Exhibit 15.

Mr. Lyon: Counsel, in which location was that billboard?

Mr. Elliott: That was the one right off Olympic. I don't remember the cross street.

(The exhibit referred to was marked Plaintiff's Exhibit 15 and was received in evidence.)

Mr. Schapp: I now desire to bring to the [32] court's attention the defendants' answers to plaintiff's Interrogatory No. 7—the question read:

"Please list in detail and identify each and every form of advertisement or sales media, including brochures, other literature, television, radio, bill-

(Testimony of Harold John Miller.)

boards, other sign displays, pamphlets, newspapers and the like, in which you have used or authorized the use of the phrase 'The Wonder Bed' and/or the phrase 'Wonder Bed,' setting forth further when each use was commenced, how long each use has or did continue, and when each use was stopped, if stopped before the commencement of the above-entitled action."

Then the answer to this interrogatory is:

"As presently advised, defendants believe that the descriptive phrase, 'The Wonder Bed,' was probably used in the following advertisements:"—

Now, does your Honor desire to have this read into the record?

The Court: You might read it into the record. I think that is the best way.

Mr. Schapp: "(1) Brochures—15,000 printed for use as of August 31, 1954;

"(2) Truck sides painted, September 17, 1954, one truck currently in use;

"(3) Billboards—three in use, one since October [33] 15, 1954; two as of November 8, 1954;

"(4) L. A. Times Home Magazine—October 3, 1954, also October 17th and 31st, November 7th, 14th, 21st and 28th, December 5th, 12th, 19th, 26th, January 2nd, 9th, 16th, 23rd, 30th, February 13th, 20th and 27th;

"(5) Los Angeles Examiner Pictorial Magazine—November 7, 1954, also November 14th, 21st and 28th, December 5th, 12th and 19th, January 2nd, 9th, 16th and 23rd;

(Testimony of Harold John Miller.)

“(6) Catholic Directory, October publication date annual;

“(7) Hollywood Reporter—October 11, 1954, plus October 26th, November 8th and 23rd, December 3rd, 9th and 15th;

“(8) Daily Variety—October 7, 1954, plus October 20th, November 5th, 17th and 29th, December 9th and 14th;

“(9) Play-Goer—October, 1954, all weeks, also weeks of November 22nd, November 29th, December 6th and 13th;

“(10) Beverly Hills News Life—October 13, 1954; October 18th and 25th, November 8th, 15th, 22nd and 29th, and December 6th;

“(11) Canyon Crier—October 14, 1954; October 28th, November 11th and 25th, December 9th;

“(12) Christmas mailers—1,000 completed December [34] 9, 1954;

“(13) Los Angeles Herald-Express—November 25, 1954;

“(14) KCBH radio spots, month of December, 1954;

“(15) Pasadena Star News—December 3, 1954, and December 10th;

“(16) Newport-Balboa News—December 7, 1954;

“(17) Newport-Balboa Press — December 2, 1954;

“(18) Hollywood Citizen-News—December 3, 1954, and December 10th;

“(19) Valley Times—December 3, 1954; December 7th and 10th;

(Testimony of Harold John Miller.)

“(20) Los Angeles County Medical Directory, Annual, December, 1954.”

Q. Now, Mr. Miller, referring to the photograph of the billboard introduced in evidence as Exhibit 15, I will ask you to compare the position of that lady sitting on the device with a person seated on your chair, if your chair is posed at the proper angle.

A. Well, we call this our “hips down, knees up” position. We have used that for years.

Q. Referring to this chair, for instance, if I tilt this in this manner, it would be done by body movement? A. Yes.

Q. If I tilt it like this, would the position of a [35] person sitting in this chair be just about the same as the position of that lady?

A. Well, I would say so—in other words, hips down, knees up.

Q. Hips down, knees up? A. Yes.

Q. As a matter of fact, this “hips down, knees up” is a feature you have featured for a good many years in your advertising?

A. Yes. I mean, we mention that in selling, too.

Mr. Lyon: May I hear the answer to that question, please?

The Witness: I say, we mention that in selling, too.

Q. (By Mr. Schapp): Mr. Miller, what class of customers do you sell these chairs to, principally?

A. Well, I would say offhand middle-aged and older people. That’s our general—

(Testimony of Harold John Miller.)

Q. Do you ever have an opportunity of selling any of these chairs to hospitals?

A. Well, the hospitals have used them. As a matter of fact, most of the state psychiatric hospitals have them now. I don't know how they use them, but they have them.

Q. They are particularly used for invalids?

A. You mean by the state?

Q. Yes. [36]

A. Frankly, I don't know. All I know is that we have sold them all. I never checked into it. I remember at one time we sold the Stanford people in their psychiatric department, something about an electric—I forget what they call it.

Mr. Lyon: Can you speak up, please, Mr. Miller? I can't hear you.

The Witness: I say, we sold the Stanford Hospital, in their psychiatric department. They bought one or two chairs.

The Court: Well, it is noon, Mr. Schapp. I know you are from San Francisco. Ordinarily we stop at this time.

Mr. Schapp: All right.

The Court: We will recess until 2:00 o'clock. You are probably down from San Francisco, and Mr. Miller. You intended to be here for two or three days on this trial, didn't you?

Mr. Schapp: Yes.

The Court: Is 2:00 o'clock satisfactory?

Mr. Schapp: Yes, thank you.

The Court: All right, recess until 2:00 o'clock.

(Noon recess.) [37]

(Testimony of Harold John Miller.)

January 25, 1956—2:00 P.M.

Direct Examination
(Resumed)

By Mr. Elliott:

Q. Mr. Miller, will you kindly tell us, if you can, or at least give us an estimate of what proportion of your gross business has been done in the Los Angeles area? A. About 50 per cent.

Q. About 50 per cent? A. Yes.

Q. During what period has that been?

A. Well, last year's business, '54's business. This is about the same—'55.

Q. Have you any way of knowing how many persons would go to the Sleeper Lounge Manufacturing Company to purchase Wonder Beds—rather, to purchase Wonder Chairs as a result of—to purchase Wonder Beds as a result of the extensive advertising you have given the term "Wonder Chair"?

Mr. Lyon: Your Honor, I am going to object to the question. There is no foundation laid for this, that he has any knowledge concerning the operation of the defendant whatsoever, or any knowledge of the type of person that [38] comes in and purchases things, or of their activities. This man is president of the corporation. He is not a salesman.

The Court: I will overrule the objection. He may answer that.

You may answer that.

(Testimony of Harold John Miller.)

The Witness: I haven't any idea.

The Court: That more or less takes care of it.

Q. (By Mr. Elliott): Where are you located?

A. Myself?

Q. Where is your business office?

A. 1020 Geary Street, San Francisco.

Q. Is that your base of operations?

A. That is right.

Q. Do you know where the defendant in this case is located?

A. Well, I just found out since this; 3279 Wilshire Boulevard, I believe, from the advertising.

Q. In Los Angeles? A. Yes, Los Angeles.

Q. Can you tell us or give us an estimate of approximately what proportion of the furniture which you sell, or chairs, convertible beds and the like, are sold to persons who have a health problem or have mentioned a health problem to you or to your managers?

A. Well, it could conceivably be about 35, 40 per cent— [39] could be.

Q. Do you ever mention, in selling your chairs in your stores, any features of your chairs that might alleviate or correct health problems?

A. Well, we do mention conversationally that the relaxation would probably help.

Mr. Lyon: I move to strike that answer if it is not limited to his own knowledge. He says "we."

The Witness: Myself.

Mr. Lyon: Including himself or anybody else in the store.

(Testimony of Harold John Miller.)

The Court: I will let that part be stricken. He may answer again.

Q. (By Mr. Elliott): Do you personally, in your sale of your products, ever mention features which might help alleviate health problems?

A. Yes; we mention that it would possibly help health.

Mr. Lyon: Same objection, your Honor. I would like Mr. Miller to answer from his own personal recollection. Eliminate the word "we."

The Witness: I.

The Court: He said I.

Mr. Lyon: If he answers "I," the answer may go in.

The Court: The answer is "I."

Mr. Elliott: That is all the questions we have, your [40] Honor.

The Court: That is all.

Cross-Examination

By Mr. Lyon:

Q. During the course of your testimony, Mr. Miller, I believe you testified that the Bell Manufacturing Company makes convertible furniture?

A. That is right.

Q. Do you make any other type of furniture that is not what you would call "convertible"?

A. Well, we make relaxation furniture.

Q. What is "relaxation furniture"?

A. It is a piece right here.

(Testimony of Harold John Miller.)

Q. Is that a convertible piece of furniture?

A. And relaxing.

Q. What do you mean by the term "convertible"?

A. Converts into a bed.

Q. In other words, converts from what into a bed?

A. From a chair into a bed.

Q. So that if it doesn't convert from a chair into a bed, it is not a "convertible" piece of furniture; is that correct?

A. Could be.

Q. I am asking the question. Is that your understanding? [41]

A. I say it could be.

Q. How does a relaxation piece of furniture distinguish from a convertible piece of furniture?

A. Well, in our case they are almost synonymous.

Q. Well, there must be some difference. You said you make both kinds. What did you have in mind when you said you make both kinds?

A. Well, for instance, we make a rocker.

Q. A rocking chair?

A. Yes.

Q. That is a relaxation piece of furniture?

A. Well, a rocker is a rocker. It could relax, but not in the terms that this one does.

Q. I still don't follow the distinction there is between "convertible" and "relaxation."

A. The distinction would be that in a rocker the individual is always in the same position, but the item itself changes positions; the rocker changes, but the individual is still sitting at a right angle, so to speak. With this chair we stretch a fellow out.

(Testimony of Harold John Miller.)

Q. So that as the term is defined by you, if the feet are horizontal and the back pivots—is that what you call a convertible piece of furniture?

A. Not particularly, because here the back pivots and the feet are down. [42]

Q. So that would be just a bed; is that correct?

A. No; that is a relaxing chair, too.

Q. I am talking about the situation that I presented to you, where the feet remain horizontal and the back pivots back and forth.

A. We do make a piece where the back doesn't pivot; it has to be laid down. That would be convertible. It doesn't pivot.

Q. I am not talking about the back now. I am talking about the foot rest portion of the furniture.

A. We make a three-cushion divan that has no foot rest on it.

Q. I am not talking about your product. I am talking about your use of the word "convertible."

A. I imagine in the furniture business a convertible piece of furniture would be a piece that converts into a bed.

Q. From——

Q. From anything, probably.

Q. From a chair?

A. For instance, we make a heart-rest chair that is, in effect, a lounge that converts into a bed—a heart-rest chair converts into a bed.

Q. In your trade-mark registration you refer, as I recall, to "reclining chairs" and "convertible chair-beds." [43] What is a reclining chair?

(Testimony of Harold John Miller.)

A. This one right here.

Q. This is a reclining chair?

A. Yes, and a convertible, too.

Q. And this is a convertible chair-bed? So when you use that terminology in this trade-mark registration, this is the product you are referring to?

A. More or less. I don't know what is in the trade-mark.

Q. I just read it to you; it says "reclining chairs and convertible chair-beds."

Mr. Elliott: I object, your Honor; that is a question of law. The witness is not qualified to answer.

The Court: I will overrule the objection. He may answer.

The Witness: We could.

Q. (By Mr. Lyon): I am not asking what you could. I am asking what that language means in your registration certificate. Does it mean this piece of furniture? A. It could, yes.

Q. Does it mean any other kind of furniture?

A. Conceivably could. It could mean our heart-rest chair.

Q. Have you seen anything that has been presented to you this morning in the way of advertisements or otherwise [44] that shows what a heart-rest chair looks like?

A. I think I mentioned it; yes, in our catalog.

Q. In your catalog—Exhibit 6?

A. That isn't the one.

Q. This is not the one?

(Testimony of Harold John Miller.)

A. No. It is the yellow one.

Q. This one? A. That's it.

Q. Would you identify in there what you call the "heart-rest chair," please—Exhibit 9?

A. (Witness indicating.)

Q. That is the item shown on page 6?

A. Yes.

Q. You testified this morning as to a group of items put out by your organization upon which the word "Wonder" appears. May I inquire as to which of those items carry the trade-mark "Wonder Chair"?

A. This one here is the item.

Q. Perhaps I can refresh your memory, sir.

A. Yes, I remember.

Q. Oh, you do remember?

A. This is the Wonder Chair here.

Q. That is the only item you put out with the trade-mark "Wonder Chair" on it?

A. Yes. [45]

Q. Showing you now Plaintiff's Exhibit 9 and specifically page 2 thereof, I direct your attention to the phrase, at the top of the page, which says, "The Bell Wonder Chair-Bed."

A. Yes.

Q. Is that item the one in front of us?

A. Yes—different style.

Q. Is this the manner in which the trade-mark appears on the label on that device?

A. No. I think it says, "Bell Wonder Chair." It is on the panel, here.

Q. Would you locate it for me, please?

(Testimony of Harold John Miller.)

A. Yes. It is on the panel (stepping down from the witness stand and indicating).

Q. "The Wonder Chair"?

A. "The Wonder Chair."

Q. That is the manner in which you presently use the trade-mark; is that correct? A. Yes.

Q. How long have you used it in that format?

A. For many years, to my knowledge.

Q. As long as you can remember?

A. I would have to think. As far as I know, we have used that for quite a while (witness resuming the witness stand). [46]

Q. You testified, I believe, that you have been with the organization for 15 years? A. Yes.

Q. Has it been used in that form for 15 years?

A. As far as I know, it was.

Q. The word "Bell" has always been superimposed above the word "Wonder Chair"?

A. I believe so.

Q. The wand is always stuck through with the stars on the end of it? A. Not always.

Q. Not always?

A. I mean, now it is, but I don't know over the 15-year period.

Q. But you do know the word "Bell" was always superimposed above the word "Wonder"?

A. I said I imagine. I know it is now.

Q. Now, Mr. Miller, what do your duties as President of the organization involve?

A. I should say general manager.

Q. General manager? A. Yes.

(Testimony of Harold John Miller.)

Q. Do you do any sales work? A. Oh, yes.

Q. Do you actually sell items? [47]

A. I do.

Q. Do you make trips to your various offices in order to promote the sale of these items?

A. Yes.

Q. Do you contact the purchasing public, the individual buying these items?

A. In what territory?

Q. Any territory.

A. In San Francisco, I do.

Q. You mean you are on the floor of your shop and a customer comes in and you will talk to him?

A. On occasion.

Q. How often does that occur?

A. Could happen. It depends how heavy the traffic is.

Q. In other words, you help out when the staff in the front office is too busy? A. Yes.

Q. How many people would you say you talk to in a year or a month or a week?

A. Well, this week I, personally, sold about five chairs.

Q. You talked to five customers or 45—how many?

A. I think, to tell the truth, about seven.

Q. You talked to about seven, and about five of them purchased those items? [48] A. Yes.

Q. Do you have any kind of display windows in front of your office?

A. In our San Francisco store?

(Testimony of Harold John Miller.)

Q. Yes.

A. Oh, yes, sure. My office is behind the store.

Q. So that the public walking down the street can look in the window and see the merchandise you are selling?

A. Yes.

Q. They come in and ask, "How much is that chair in the window?"

A. Could be. I wouldn't say they just come in. They come in through advertising, mostly. In San Francisco we are in an isolated location.

Q. So that the average person has to read your ads and find out where you are and come down to see you?

A. That would be my judgment. I think so.

Q. Is that true of the Los Angeles offices and the other offices? Or do you know?

A. Well, of course, you know Los Angeles. Hill Street is more or less isolated, I would say, as far as general foot traffic is concerned—Hill and Olympic. Crenshaw, I imagine, is pretty good foot traffic there.

Q. But the average person reads your advertisement and finds out where your organization is and goes in and buys one [49] of these from you?

A. That would be my assumption.

Q. What type of person is it that comes in usually to purchase one of these?

A. Well, on an average, middle-aged and older people.

Q. Older people?

A. Middle age and older. Occasionally, we sell younger people, too.

(Testimony of Harold John Miller.)

Q. But the great majority of them are older people? A. Yes.

Q. They buy this as more or less a luxury item?

A. I wouldn't say so. I would say it would be essentially practical.

Q. As any piece of furniture they buy around their house; is that correct?

A. Well, I presume they have a specific need for a bed-chair and relaxing chair. As I said this morning, it is unique.

Q. There is no other like it, to your knowledge?

A. We make what we call the "Bell Lounger" that relaxes but doesn't convert, you see.

Q. We will get back to that again. I have a little difficulty figuring out what you mean when you say "relaxes but doesn't convert."

A. I just explained; this relaxes and [50] converts.

Q. When you use the term "convert" or "relax," what do you mean by that?

A. Well, we use it parallelly on this deal, because that is precisely what it does; it relaxes and converts.

Q. What do you mean by "it converts"?

A. Converts into a bed.

Q. From what?

A. Well, I presume a chair. You couldn't call it anything else.

Q. What is the price range of this item?

A. This particular item, from 134 up, depending on the quality of the—

(Testimony of Harold John Miller.)

Q. Up to what?

A. A fellow could go as high as 275 for that. This particular one, as I told somebody this morning, is around 200.

Q. What does the fluctuation of the price depend upon?

A. On the quality of the covering. For instance, this particular one—I didn't notice when they sent it down—has a kick plate which would change the price, and has a special arm.

Q. All of these you sell are upholstered; is that correct? A. Yes.

Q. And the price will depend on the quality of the [51] upholstering which you put on it?

A. Essentially, plus any other special device. Sometimes we build these to order, you know. When a tall man comes in and if we build the back higher we charge them so much an inch, or if we have to make other modifications to fit him we charge him for it sometimes.

Q. Those are what you call "custom made"?

A. I presume most of our stuff would be, because very seldom do we sell the pieces themselves from the floor.

Q. In other words, the great majority of your trade is what you call "custom made," just like when you go to have a tailor made suit of clothes made, they come in and say "we want a chair in this fabric or this style"?

A. Yes, we do make them up. Of course, occasionally our people do sell them from the floor.

(Testimony of Harold John Miller.)

Q. Occasionally they sell them from the floor, but the great majority of your business is the custom built type? A. Yes.

Q. So that people know with whom they are dealing and they make a specific order for a specific one of your chairs; is that right?

A. Could be.

Q. You testified that 35 to 40 per cent of the sales that you made were to people with health problems? A. Could be. [52]

Q. Upon what did you base that testimony?

A. Well, a lot of people come in with arthritis and they want to relax, and people with heart conditions.

Q. Where did you get the number 35 to 40 per cent?

A. Well, it seems a lot of our middled-aged and older people come in for relaxation on account of some condition.

Q. Where did you get the figure 35 to 40 per cent?

A. Well, it seems that most of our chairs are sold to that type of people, and my guess is—

Q. I appreciate that. But where did you get the figure 35 to 40 per cent? You made that up? It was your idea?

A. Somebody asked me that question, and I answered it.

Q. That is correct. But have you ever made any analysis of it—sales analysis?

(Testimony of Harold John Miller.)

A. That is just my general knowledge.

Q. Have you ever made any sales analysis through your organization as to where these chairs go and who buys them?

A. We have no specific analysis, but after 15 years a fellow more or less keeps his finger on the pulse.

Q. Yes, but as I understand it you only sell these items when the floor is crowded and you help out, was your testimony.

A. No, I wouldn't say. We have a small office and I [53] hear what is going on. As a matter of fact, I make it my business to know what is going on.

Q. So a lot of that information is based upon what somebody else told you; is that correct?

A. Not particularly, because usually, like all salespeople, anybody connected with sales will bear out, when a person makes a sale, they say, "Well, we sold so and so. He has asthma" or something. I hear personally practically about every sale.

Q. In other words, your office is such that you can hear what is going on all of the time?

A. Yes.

Q. The figure 35-40 per cent is then based upon what you hear?

A. What I overhear, and from my own experience. It seems if a person wants a straight chair and is in good health, they buy it.

Q. Mr. Miller, have you ever received any mail directed to the Sleeper Lounge Company?

(Testimony of Harold John Miller.)

A. Not to my knowledge.

Q. Your organization?

A. Not to my knowledge.

Q. Has your organization ever received any telephone calls directed to the Sleeper Lounge Corporation? A. Not to my knowledge. [54]

Q. Has your organization ever received any purchase orders from anybody directed to the Sleeper Lounge Company?

A. Not to my knowledge.

Q. Has anybody ever come into your organization and asked for an electric bed?

A. Not to my knowledge.

Q. Has anybody come into your organization and asked for a sleeper lounge?

A. Not to my knowledge.

Q. Who else in your organization would have any knowledge superior to yourself on these last series of questions?

A. I wouldn't say it is superior, but they might have actual knowledge of somebody asking for it. I didn't hear about it.

Q. But you overhear your sales personnel when they sell them to somebody else?

A. Not in Southern California.

Q. Not in Southern California.

Mr. Lyon: That is all I have. No further questions.

The Court: All right.

(The witness steps down.) [55]

CERTIFICATE

I hereby certify that I am a duly appointed, qualified and acting official court reporter of the United States District Court for the Southern District of California.

I further certify that the foregoing is a true and correct transcript of the testimony of Harold John Miller had in the above-entitled cause on January 25, 1956, and that said transcript is a true and correct transcription of my stenographic notes.

Dated at San Diego, California, May 18, 1957.

/s/ JOHN SWADER,
Official Reporter.

[Endorsed]: Filed May 20, 1957. [56]

United States
Court of Appeals
FOR THE NINTH CIRCUIT

MOE WEISE AND JAMES LESTER FRENCH,
Appellants,

v.

UNITED STATES OF AMERICA,
Appellee.

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON,
NORTHERN DIVISION

HONORABLE GEORGE H. BOLDT, *Judge*

BRIEF OF APPELLEE

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BRIEF OF APPELLEE

STATEMENT OF THE CASE

On February 6, 1957, the appellants were convicted and sentenced on two counts of the indictment charging them with transporting obscene materials between Portland, Oregon and Tacoma, Washington, in violation of 18 U.S.C. 1465.

In this appeal from that conviction the appellants contend that photographs, films and physical evidence admitted during the trial should have been suppressed as having been seized incident to an unlawful arrest. These items of evidence were removed from the car driven by the appellants at the time of their arrest in Tacoma, Washington, on March 17, 1956. Appellants acknowledge that the material thus seized was obscene within the meaning of the statute.

They allege that their apprehension was unlawful because the arresting agents had no personal knowledge other than hearsay of the transportation of the obscene material in interstate commerce and that hearsay information however reliable cannot be the basis of probable cause to sign a complaint or for their arrest by agents of the FBI without a complaint and warrant.

The arrest of the appellants and the seizure of the evidence is alleged to have been in violation of their rights under the Fourth and Fifth Amendments to the Constitution of the United States.

The events leading to the arrest may be summarized as follows: Weise was known to agents of the FBI to be a dealer in pornography. He had previously been prosecuted for offenses involving obscene materials. He had been under investigation by the FBI

for interstate transportaion of such materials for a considerable period of time.

On March 15, 1956, while under surveillance established by the FBI, the appellants left Los Angeles, California in a Buick automobile belonging to Weise, the back end of which was observed by the agents to be loaded in excess of normal baggage. Under continuous surveillance appellants arrived in San Francisco later on the same day. After arrival at San Francisco, Weise was known to have advised an informant that he had in his possession packages of pornographic photographs for sale. On the following day the appellants were observed to make calls at several novelty houses in San Francisco known to deal in obscene material. On each occasion packages were removed from the car and delivered to the place of call. Later on the same day, Weise and French were observed by FBI agents conducting similar operations in Oakland and Sacramento, California. On the following day they arrived at Portland, Oregon, where they were also under continuous observation by agents of the FBI. They were observed taking packages from their car to two places known to deal in pornographic materials in that city. As they left Portland, on the evening of March 17, and proceeded into the State of Washington they were under continuous surveillance until the time of their arrest on arrival at Tacoma.

In the meantime, Special Agent Charles N. Hiner, having been briefed and advised through FBI channels, of the aforesated activities of the appellants, was directed to file a complaint charging them with interstate transportation of obscene material in violation of 18 U.S.C. 1465. The complaint was lodged by Hiner before Commissioner Burns in Seattle, Washington, on March 17, 1956, and prior to the time of the arrest. Simultaneously, F. Willard Ralston, the Senior Resident Agent of the FBI Tacoma office, was advised that the complaint and warrant had been issued. He was also thoroughly briefed in a 45 minute telephone conversation of the appellants' activities by the agent coordinating the investigation in Seattle, Washington. He was directed to undertake surveillance of Weise and French as they proceeded toward Tacoma. Accordingly, Ralston and three other agents under his direction proceeded to Olympia, Washington, where they undertook surveillance of the car and its occupants between that city and Tacoma. As appellants passed through Olympia, Ralston was able to observe that their car was heavily loaded and that the area behind the front seat was loaded with cardboard boxes. As the car proceeded through Tacoma on Center Street it was stopped by Ralston and his crew. Appellants were arrested and the contents of the car were seized as an incident of the arrest.

The material contained in the car consisted of some 60,000 photographs packed in the cartons previously observed by Ralston. Of this number, more than 9,000 were plainly and admittedly obscene. In addition to the photographs, there were a number of salacious books, pornographic "dildoes" or figurines and a quantity of contraceptives, together with so-called loops of obscene moving picture film.

QUESTIONS PRESENTED

1. Did Special Agent Charles N. Hiner have probable cause to file a complaint charging the appellants with violation of 18 U.S.C. 1465?

2. Did the arresting agents of the Federal Bureau of Investigation at Tacoma, Washington have probable cause to arrest the appellants for violation of 18 U.S.C. 1465?

ARGUMENT AND AUTHORITIES

The appellee takes the position that the Fourth Amendment of the Constitution of the United States is not applicable to the arrest and seizure of evidence under the circumstances involved in the instant case, that the complaint filed by Agent Hiner was valid, as was the warrant issued thereon, and finally that the arrest of the appellants and seizure of the pornographic material in their car would have been lawful

under the circumstances if the complaint had not been filed and no warrant had issued.

A. THE FOURTH AMENDMENT OF THE CONSTITUTION

The Fourth Amendment of the Constitution is primarily concerned with unreasonable search and seizure and attendant invasion of the privacy of the individual citizen. It is intended to protect the citizen's right to be free from unlawful invasion of such privacy by the agents of the Government.

The warrants condemned by the Amendment are search warrants and not warrants of arrest. The warrant described in the Fourth Amendment shall issue "particularly describing the place to be searched and the person or things to be seized." The use of the disjunctive word "or" clearly indicates that only search warrants are the concern of the Amendment.

Thus, in *Nueslein v. District of Columbia* (C.A. D.C. 1940), 115 F. 2d 690, the court held that officers had no right to enter a man's house with or without a search warrant merely for the purpose of investigation or to gather evidence. In *Gouled v. United States*, 255 U.S. 298, at 309, the Supreme Court of the United States, after discussing the purpose of the Fourth Amendment and its own prior considerations, concluded with respect to search warrants:

“They may not be used as a means of gaining access to a man’s house or office and papers solely for the purpose of making search to secure evidence to be used against him in a criminal proceeding.”

Boyd v. United States, 116 U.S. 616; *Weeks v. United States*, 232 U.S. 383; and *Marron v. United States*, 275 U.S. 192, at pp. 195-196.

In the instant cause we are not concerned with an arrest following an illegal search in violation of the Fourth Amendment. The arrest by officers believing they had probable cause came first. Apprehension of the appellants was the essence of their act. The search of the automobile occupied by them followed as an incident to the arrest.

The Court in the *Weeks* case went out of its way to make this distinction at page 392. In discussing what the *Weeks* case “is not”, the Court wrote the following:

“It is not an assertion of the right on the part of the Government always recognized under English or American law to search the person of the accused when legally arrested to discover and seize the fruits or evidences of the crime.”

We therefore contend that the Fourth Amendment is involved in the instant case only if the arrest was unlawful because of lack of probable cause to obtain the warrant or to arrest without warrant.

Cases cited by the appellant are not authority to the contrary. The *Weeks* case has previously been discussed. The *Olmstead* case does not appear significant to us as it relates to tapping of outside telephone lines, in order to obtain evidence prior to arrest. This activity, the Court held, was not a violation of the Fourth Amendment. *U. S. v. Tureaud* deals with a sworn information, a proceeding no longer used. The decision is more than 70 years old and has been superseded by decisions of the Supreme Court discussed later in this brief and the Federal Rules of Criminal Procedure relating to complaints. Likewise, the McCunn decision of 1930 has been modified by adoption of Rule 3, Federal Rules of Criminal Procedure.

U. S. v. Grau, 287 U.S. 124 again involves a search warrant. Search of dwellings was authorized by the National Prohibition Act only when they were used for unlawful sale. The warrant in question was based on information of manufacturing rather than sale and therefore was invalid in the opinion of the Court.

The Court on page 128 declared that a search warrant may issue only on evidence which would be competent in the trial of the offense before a jury.

It is interesting to note the reference to this declaration set forth in *Brinegar v. U. S.*, 338 U.S., 160 at page 174:

“For this proposition there was no authority in the decisions of this Court. It was stated in a case which the evidence adduced to prove probable cause was not incompetent, but was insufficient, to support the inference necessary to the existence of probable cause. The statement has not been repeated by this Court.”

Clearly the Fourth Amendment is no bar to the Complaint as filed and the warrant as issued in the instant cause.

The real question is whether the warrant and the arrest were validly executed with probable cause. We believe that the complaint was filed and the warrant issued lawfully and that the arrest was lawfully executed had there been no complaint and warrant.

B. THE COMPLAINT AND WARRANT

The complaint was filed under oath by Agent Hiner of the FBI, substantially in the language of the statute. It specified the operative facts on which the charge is based, including the place and date of the offense, the identity of the defendants and a description of the material alleged to be obscene. Insofar as language is concerned, there has been a literal compliance to the Fourth Amendment if that amendment is a factor as to the filing of the complaint.

The complaint is also in compliance with Rule 3 of Federal Rules of Criminal Procedure in that it is

a written statement under oath of the facts constituting the charge. *U. S. v. Walker* (C.A. N.Y. 1952), 197 F. 2d 287; cert. den. 344 U.S. 877. If the complaint is unlawful it could be only for the reason that Agent Hiner's personal knowledge of the operative facts was limited to information obtained by FBI agents throughout California, Oregon and Washington and relayed to him through FBI channels.

We submit that the information so obtained in this case was more than adequate to establish probable cause in the mind of any reasonable person.

In *U. S. v. Ruroede*, 220 Fed. 210 (D.C. N.Y. 1914), the judge construed a complaint where it was flatly stated: "The source of the deponent's information . . . as to the facts herein are based on an official investigation which can not be disclosed at this time." Yet Judge Hand found nothing wrong in this method of charging. He based his habeas corpus on the fact that no *facts* were alleged which if true would have constituted a crime.

In *Brinegar v. U. S.*, *supra*, at page 175, the Court in discussing probable cause adopted the definition set forth in *McCarthy v. DeArmit*, 99 Pa. St. 63: "The substance of all definitions of probable cause is a reasonable ground for belief of guilt, and this means less than evidence which would justify condemnation. The

rule of probable . . . cause is a practical non-technical conception. Requesting more would unduly hamper law enforcement . . .”

In *Carroll v. U. S.*, 267 U.S. 132 at page 161, the Supreme Court quotes with approval the following language of Chief Justice Shaw in *Commonweath v. Corey*, 12 Cush. 246: “If a constable or other peace officer arrests a person without warrant, he is not bound to show in his justification a felony actually committed to render the arrest lawful, but if he suspects one on his own knowledge of facts, or on facts communicated to him by others, and thereupon he has a reasonable ground to believe that the accused has been guilty of a felony, the arrest is not unlawful.”

In *U. S. v. Bianco* (C.A. 3, 1951), 189 F. 2d, 716, the Third Circuit applied the same reasoning to the operation of the FBI. “The size and character of the FBI, however, are alone enough to suggest that it must have been supposed that agents . . . would rely on the summary conclusions of their fellow agents. To require full inter-office reports in a large organization that must act quickly would plainly hamstring its functioning.” To hold to the contrary would mean that a warrant could never issue in a traveling violation of the sort involved in the instant case unless the agents from various points in California and Oregon had been flown to Seattle to make their personal oaths before

Commissioner Burns. This, we submit, would be an unreasonable requirement of the law.

In the very recent case of *Costello v. U. S.*, 350 U.S. at 359, the Supreme Court sustained the validity of an indictment based solely on hearsay evidence, holding that it was not in violation of the Fifth Amendment requirement of presentment to the Grand Jury.

Certainly, in view of the information provided Agent Hiner by his fellow agents, he had reasonable ground to believe that the accused appellants had been guilty of a felony.

C. THE ARREST WAS VALID WITHOUT WARRANT

We first contend that if the warrant is valid, it is not necessary that it be in the hands of the arresting agent. *Bartlett v. U. S.* (C.C.A. 5, 1956), 232 F.2d 135. It has also been established that an arrest by an officer pursuant to an unlawful warrant is a valid arrest if in fact the officer had probable cause to arrest without the warrant. *U. S. v. Gowan* (C.C.A. 2, 1930), 40 F.2d 593.

With respect to arrest without warrant, the Supreme Court in *Carroll v. U. S.*, 267, U.S. 132 at 149, has stated: “. . . the true rule is that if the search and seizure without warrant are made upon probable cause, that is, upon a belief reasonably arising out of

circumstances known to an officer, that an automobile . . . contains that which by law is subject to seizure and destruction, a search and seizure are valid.”

The pornographic pictures in question being subject to seizure and destruction (18 U.S.C. 1465), the case is clearly in point.

The Ninth Circuit has held squarely: “. . . if the arrest was lawful, the officers had a right as an incident to the arrest to search the cars in which the appellants were seated.” *Sugarman v. U. S.* (C.C.A. 9, 1929), 35 F. 2d, 663 at 665.

Special Agent Ralston was obliged under 18 U.S.C. 3052, to “. . . make arrests without warrant of any . . . felony . . . if . . . he have reasonable grounds to believe that the person to be arrested has committed or is committing such felony.”

At the time of arrest he had been fully briefed concerning the activities of the appellants as they were observed by a number of FBI agents from March 15, 1956 to the moment of arrest. He knew that Weise was a dealer in pornography, that the appellants had made deliveries of packaged materials to dealers of pornography in San Francisco, Oakland and Portland, that their car was loaded with cardboard cartons. These he had observed personally in appellants' car before arrest. He knew that Weise had stated that he had

“the real thing” with him. He also knew that Weise had previously sold pornography to dealers in Seattle and that he was headed for Seattle.

If the validity of arrest without warrant must be construed in accordance with state law, the element of probable cause on the part of Agent Ralston has been more than adequately established under the law of Washington.

In *Eberhart v. Murphy*, 113 Wash. 449 (1920), arrest without warrant was sustained by information contained in a letter from a prosecuting attorney reciting his opinion that the defendant was guilty of grand larceny.

In *State v. Thornton*, 137 Wash. 495, where officers had information from officers of another county that the defendant had delivered liquor in violation of the law, the validity of the arrest was sustained. In *State v. Bantam*, 163 Wash. 598, a motion to suppress was denied when the officer had an anonymous tip by telephone which described the appellant by name and appearance and gave the description of his automobile. The tip was subsequently confirmed by the time of his arrival at the place of arrest and also the appearance of the automobile.

CONCLUSION

We take the position that the obscene material entered in evidence in this cause was seized and obtained by agents of the Federal Bureau of Investigation incident to the valid arrest of the appellants herein. We, therefore, respectfully submit that the ruling of the trial court in this cause should be affirmed.

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Attorneys for Appellee,

United States of America

No. 15502

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

MOE WEISE and JAMES LESTER FRENCH,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

Upon Appeal From the United States District Court for the
Western District of Washington, Northern Division.

Honorable George H. Boldt, Judge.

PETITION FOR REHEARING.

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MAR 6 1958

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Honorable George H. Boldt, Judge.

PETITION FOR REHEARING.

I.

Grounds for Petition for Rehearing.

Appellants respectfully request a rehearing in this matter on the following grounds:

1. The decision is predicated upon facts not properly included within the record of the case.
2. The decision fails to take into consideration arguments advanced by appellants in their reply brief and in oral argument before the Court.
3. The decision is contrary to the law as determined by the Supreme Court of the United States.
4. The decision is contrary to the Fourth Amendment to the Constitution of the United States.

II.

The Decision is Predicated Upon Facts Not Properly Included Within the Record of the Case.

The decision designates among the "Facts" of the case that "appellant Weise was known to the agents of the Federal Bureau of Investigation as a dealer in pornographic materials and of having a record of convictions as such".

The record in this case does not disclose such facts. The most that could be said in this connection is the statement as contained in the opening brief of appellee where it states that "Weise was known to have advised an informant that he had in his possession packages of pornographic photographs for sale". Even this statement however, is an exaggeration of the testimony elicited from the F. B. I. officers at the trial. The reference to this appears on page 66 of the Record where Agent Ralston is testifying as to the basis of his knowledge at the time of the arrest. He states in part that:

"I learned through this conversation that a Mr. Weiss a dealer in photographs of an obscene nature; he worked in Los Angeles, and that he had told someone in Los Angeles he was making a trip in which he had his car loaded with the real stuff, as he described it, said that it was not just strippers this time".

The record does not contain the further alleged fact that he was "known to the agents of the F. B. I. to be a dealer in pornography" or that he had been "previously prosecuted for offenses involving obscene materials" as set forth in the brief of the appellee and as set forth in the decision of the Court.

This issue came before the Court at the time of oral argument and it was correctly pointed out to the Court that if the F. B. I. did in fact have information of this nature, it was not so disclosed in the record of this case and therefore, cannot be used as a basis for upholding the conviction of the appellant. If the Court has in fact relied upon these matters outside of the record as is indicated by the decision of the Court, the appellants would thereby be denied due process of law and the appellants should be accorded a rehearing to be given an opportunity to establish that their convictions cannot be properly upheld without consideration of these improperly considered matters.

III.

The Decision Fails to Take Into Consideration Arguments Advanced by Appellants in Their Reply Brief and in Oral Argument Before the Court.

The decision as handed down by this Honorable Court takes into consideration only the matters raised by appellants in their opening brief. No recognition is given to the response of the appellants to the Government's brief as set forth in appellants' reply brief nor is any consideration given to the cases or arguments made in oral argument before the Court.

For example, the Court cites the *Brinegar* case (*Brinegar v. United States*, 338 U. S. 160) as authority for upholding the decision of the Court below in this case. Yet, both in the appellants' reply brief and in oral argument, the *Brinegar* case was clearly distinguished from the present factual situation. The very language of the *Brinegar* case itself pointed out that it and the other leading case at that time, the *Carroll* case (*Carroll v. United States*, 267 U. S. 132), were the "border" situations and that the

questions presented there “lay on the border between suspicion and probable cause”. It is true that the Court found that both of those cases fell on that side of the border allowing search and seizure. The current case however, clearly falls on the other side of the border, in that the factual situation differs in substantial degree from the *Brinegar* facts. In the *Brinegar* case, the officers who made the arrest had *personally* arrested the defendant on five previous occasions for the same crime, had *personally* seen the defendant loading liquor in the car on a previous occasion, *personally* observed the car in the location which indicated a repetition of the previous crimes for which he had arrested the defendant. Thus, in *Brinegar* as well as in *Carroll*, the arresting officer had within his own *personal* knowledge the facts upon which he based the arrest. In the instant case, the information upon which the officers relied to establish probable cause was not only hearsay but was hearsay or hearsay several times removed. It follows that the instant case must fall on the other side of the boundary which the Supreme Court delineated in the *Brinegar* case, and the search and seizure be held illegal.

The Court also failed to take into consideration the arguments advanced by Counsel in oral argument relating to the *Kremen* case (*Kremen v. United States*, 353 U. S. 346). It was pointed out that the *Kremen* case was in many ways on all fours with the present case, in that, in both cases, the breadth of the seizure was of such magnitude as to make the seizure illegal in violation of the Fourth Amendment. The Court in the *Kremen* case pointed out that it was the very breadth of this seizure that created the unreasonable search and led to the inadmissibility of the evidence seized. In the current case, the Government conceded that 85% of the material seized

did not fall within the complaint that the materials were obscene or pornographic*.

No consideration is given to the argument advanced by appellants that the arresting officers did not have probable cause for their action. Aside from all of the arguments advanced in the course of the briefs, it was pointed out that the arrest took place at approximately 11 o'clock at night, under circumstances which did not require the type of search and seizure which accompanied the arrest. Assuming all of the facts as alleged by the F. B. I. in their testimony at the trial to be true, no justification existed for the type of arrest and search and seizure which took place. This was not a fleeing car requiring the nocturnal seizure. The car had been surveilled through California, Oregon and into Washington without obtaining any adequate evidence of the commission of a crime. The only evidence that existed at the time of the arrest was the anonymous tip referred to hereinabove, the indication that the appellants had stopped at numerous establishments in these states which "dealt in" such materials (but of course, which dealt in legally saleable materials as well) and that the car was "loaded down in the back". All of these facts were as evidentiary of responsible and legal business as they were of the charge for which the appellants were ultimately convicted. What justification existed then for the arresting officers to substitute further and proper surveillance for the illegal search and seizure at a late night hour as occurred here.

*This contrary to the language of the decision which states that "the boxes were seized incident to the arrest and were found to contain some 60,000 photographs and various *other* pornographic material." It would appear from this language that the Court assumes that all of the materials seized fell within the category of pornographic or obscene. This of course is contrary to the facts as elicited at the trial.

The Supreme Court in *Carroll v. United States*, 267 U. S. 132, the Court pointed out that:

“It would be intolerable and unreasonable if a prohibition agent were authorized to stop every automobile on the chance of finding liquors and thus subject all persons lawfully using the highways to the inconvenience and indignity of a search.”

Mr. Justice Jackson, in his dissenting opinion in the *Brinegar* case, summarizes the proper attitude towards this type of arrest and seizure when he states that:

“. . . to trail or pursue a suspected car to its destination, to observe it and keep it under surveillance, is not in itself an arrest nor a search, but when a car is forced off the road, summoned to a stop by a siren, and brought to a halt under such circumstances as are here disclosed we think the officers are then in the position of one who has entered a home; the search at its commencement must be valid, and cannot be saved by what it turns up.”

The Court failed, therefore, to take into consideration the circumstances of the arrest, search and seizure as being violative of the appellants' constitutional rights, and failed further to consider the breadth of the seizure as further indicating the impropriety of the acts of the arresting officers. For these reasons, too, the evidence seized was improperly admitted into evidence.

IV.

The Decision Is Contrary to the Law as Determined by the Supreme Court of the United States.

Appellants have already discussed the *Brinegar* and *Carroll* cases which are basic to a discussion of this case and will not repeat that discussion here.

The only other basic case cited by the Court is *Marron v. United States*, 275 U. S. 192. This case deals with a search warrant accompanying a warrant for arrest, and presents, it seems to appellants, a substantially different situation than that presented by this case. In the *Marron* case, the officers had sufficient information as to the nature of the crime being committed to actually secure a search warrant. The only issue raised by that case is whether the seizure of a few additional but closely related items to those specifically stated in the search warrant presented a situation of an unreasonable search and seizure. It is submitted that this is quite a different situation from that of officers arresting without a search warrant and then seizing the only evidence upon which the conviction is based. In the *Marron* case, the conviction could have been sustained on the basis of the items seized under the properly issued search warrant and the contested items seized were only additional and cumulative evidence. It would appear that this case cannot be used properly as a basis to sustain the decision in the *Weise and French* case.

V.

The Decision is Contrary to the Fourth Amendment to the Constitution of the United States.

It is submitted for all of the reasons as set forth in the preceding paragraphs that the defendants and appellants have been convicted unlawfully in violation of their rights under the Fourth Amendment to the Constitution of the United States and that this Honorable Court should grant appellants a rehearing in which to re-examine the decision entered by this Court.

Respectfully submitted,

EDWARD MOSK,

Attorney for Appellants.

Certificate of Counsel.

EDWARD MOSK, being counsel of record in the above entitled matter, respectfully submits this Certificate in support of his Petition for Rehearing on behalf of appellants.

Counsel respectfully submits that in his judgment, the Petition for Rehearing is well founded and that it is his profound belief that the Court has erred in its decision and has failed to take into consideration the matters set forth in this petition. The petition is certainly not interposed for purposes of delay and counsel sincerely believes that if the Court fails to rehear the matter, that it is a case properly for presentation to the Supreme Court of the United States.

EDWARD MOSK

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Honorable George H. Boldt, Judge.

APPELLANTS' REPLY BRIEF.

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APPELLANTS' REPLY BRIEF.

Prefatory Statement.

The weakness of appellee's position is demonstrated, broadly, by its argument that the arrests, search and seizure were necessary as a matter of law enforcement convenience, and by the additional argument that "only search warrants" are the concern of the Fourth Amendment (App. Br. p. 6).

It is not difficult to understand why these untenable positions are urged. Appellee recognizes that no search warrant was obtained here, and makes no attempt to justify the search and seizure under such process. The only basis for the legality of the search and seizure is

appellee's claim that the agents' acts were "incidental to a lawful arrest". Appellee, however, is unwilling to have the lawfulness of the arrests measured by the high standards fixed by the Constitution and the decisions of the Supreme Court interpreting the fundamental law. This will explain the resort to the argument of "administrative convenience", a matter which appellants treat later.

With respect to the specifics of this case, appellee assumes alternative positions. It argues, first, that the complaint upon which the warrant of arrest was based was sufficient upon its face to establish probable cause to believe that the offense charged had been committed by appellants. However, argues appellee, even if the complaint was insufficient and the warrant of arrest void, still the actual arrest made was valid and the search and seizure justified as incident to such arrest without warrant.

In fact and in law, appellee appears to be in error.

The arrest was made pursuant to the warrant; the agent who ordered the arrest of respondents in their presence declined at the trial to state that he felt justified in making an arrest without such warrant [R. T. 70].* Whether an arrest made by an officer under a void warrant may as a matter of law be otherwise validated is doubtful. The only case relied on by appellee is *United States v. Gowen*, 40 F. 2d 593 (C. A. 2, 1930) (App. Br. p. 12), but the appellee appears to have overlooked that that case was reversed by the Supreme Court in *Go-Bart Importing Co. v. United States*, 282 U. S.

*The reference "R. T." is to the Reporter's Transcript of proceedings.

344, the Supreme Court finding it unnecessary to pass on the question (*id.*, 352, 356).*

Appellee also appears to justify the arrests, search and seizure here by what was ultimately found. The Supreme Court has constantly held that a search, whether incident to an arrest or not, cannot be justified by what it turns up. Any other rule would simply subvert the constitutional provision. "Thus the Government is obliged to justify the arrest by the search and at the same time to justify the search by the arrest. This will not do." (*Johnson v. United States*, 333 U. S. 10, 16.) "We have had frequent occasion to point out that a search is not to be made legal by what it turns up." (*United States v. DiRe*, 332 U. S. 581, 595.) What appellee has obscured is that the officers before making the arrests here were required to have reasonable grounds to believe that the respondents had committed or were committing the offense of "knowingly transporting in interstate commerce" for the "purpose of sale" or distribution "obscene" materials. This question must be decided in the positive of the case as it stood before any arrest, search or seizure were made.

The appellee treats the issue of "probable cause" as if it were no different than "suspicion, guess or conjecture". It appears to concede that "probable cause" can only be inferred reasonably from clear and unequivocal evidence demonstrating that the offense has or is being committed; yet appellee does not hesitate to urge that the conclusion

*The oversight may be due to the change of title in the Supreme Court. Gowen was an employee of the Go-Bart Importing Company. See also the approval by the Supreme Court of the decision in *United States v. Ruroede*, 220 Fed. 210 (*id.*, p. 355) cited in appellant's opening brief here (p. 6).

can be based *solely* upon incompetent testimony—hearsay testimony twice or three times removed. For this position, appellee’s only authority appears to be *Costello v. United States*, 350 U. S. 359 (App. Br. p. 12) dealing with the validity of an indictment based on hearsay evidence before a grand jury. In the light of the distinct historical antecedents of the grand jury and the constitutional restrictions on searches and seizures, and the difference in effect between the return of an indictment and the admission of illegally seized evidence to obtain a conviction, appellee’s reliance on *Costello* seems misplaced. Moreover, since appellee relies only on hearsay testimony, the sufficiency of the evidence to establish probable cause in this case falls far below the required constitutional standards. The *Branco* and *Binnegar* cases upon which appellee relies (App. Br. pp. 10-11) presented far different factual situations than is presented here, and neither case acquiesced in the vagrant evidentiary standards which appellee is compelled to propose here.

I.

Replying to the Argument That the Fourth Amendment Is Not Applicable Here. (App. Br. pp. 6-9.)

The Fourth Amendment to the Constitution of the United States specifically provides that “the right of the people to be secure in their persons . . . shall not be violated . . . and no warrants shall issue, but upon probable cause . . . particularly describing . . . the persons or things to be seized”. The express language of the Amendment leaves no doubt that it covers warrants of arrest as well as search warrants. (*Albrecht v. United States*, 273 U. S. 1, 5; *McGrain v. Dougherty*, 273 U. S.

135-156; *Go-Bart Importing Co. v. United States*, 282 U. S. 344, 357.) “Moreover, that the Fourth Amendment covers warrants of arrest is established”. (*Wrightson v. United States*, 222 F. 2d 556, 559 (C. A. D. C., 1955).) If the constitutional safeguards were not available as against an arrest, with or without a warrant, then the search “incident to the arrest” would also be outside the ambit of constitutional scrutiny. “Once those safeguards are gone, the supremacy of force is complete, potentially even if not present factually”. (*Wrightson v. United States*, *supra*, at 559.)

II.

Replying to the Argument That the Arrests Should Be Sustained to Avoid Difficulties of Law Enforcement. (App. Br. pp. 11-12.)

The answer to this argument is embodied in the leading decisions of the Supreme Court of the United States. (See *Gouled v. United States*, 255 U. S. 298, 303; *Go-Bart Importing Co. v. United States*, 282 U. S. 344, 356.) Mr. Justice Jackson, writing for the Court in *United States v. DiRe*, 332 U. S. 581, 595, stated:

“We meet in this case, as in many, the appeal to necessity. It is said that if such arrests and searches cannot be made, law enforcement will be more difficult and uncertain. But the forefathers, after consulting the lessons of history, designed our Constitution to place obstacles in the way of a too permeating police surveillance, which they seemed to think was a greater danger to a free people than the escape of some criminals from punishment. Taking the law as it has been given to us, this arrest and search were beyond the lawful authority of those who executed them. The conviction based on evidence so obtained cannot stand.”

III.

Replying to the Argument That the Warrant of Arrest, and the Arrests Thereunder, Were Valid.
(App. Br. pp. 9-12.)

The appellee, as initially indicated, attempts first to justify the arrests under the warrant of arrest obtained by agent Miner in Seattle. Agent Ralston who ordered and participated in the arrest in Tacoma after being advised that the warrant had issued, stated that if he hadn't had the warrant, he wouldn't know whether or not he would have made the arrest [R. T. 70]. It is plain from Ralston's testimony that he could not testify that he saw appellants commit any crime [R. T. 52-64]. It is equally plain that in making the arrests, the agents could only justify under the warrant of arrest.

Appellee commences its discussion of the issue by asserting that the complaint upon which the warrant of arrest was based [Deft. Ex. B, R. T. 140], although "substantially in the language of the statute", specified, according to appellee, "the operative facts on which the charge is based" (App. Br. p. 9). The complaint is described as sufficient because it included "the place and date of the offense", the "identity of the defendants" and a "description of the material alleged to be obscene" (App. Br. p. 9).

The complaint, it is respectfully submitted, contains not a single "operative fact".* It simply states the barest conclusions of laws devoid of anything but the statutory language (see App. Br. pp. 4-7). The so-called "place

*In the trial court, the prosecutor conceded that the "operative facts" may "not have been expanded as much as they might have been" [R. T. 141].

and date of the offense” is alleged to be the “Western District of Washington, Southern Division”, but the charge against respondents was a violation of 18 U. S. C. 1465, *interstate transportation* of “obscene” materials. There is no *fact* alleged in the complaint that respondents transported such “obscene” materials from one named State to another. (*Cf.*, *Clark v. United States*, 211 Fed. 916 (C. A. 8, 1914).)

Nor is the offense sufficiently described by merely alleging in statutory language the distribution of “obscene” matters, or by the use of the redundant phrase “packets of pictures of a pornographic nature”. These are neither a sufficient statement of the *facts* establishing the offense, nor a “description of the materials” alleged to be “obscene” (App. Br. p. 9). In *Roth v. United States*, 354 U. S. 476, the Supreme Court emphasized that it is “vital that the standards for judging obscenity safeguard the protection of freedom of speech and press for material which does not treat sex in a manner appealing to prurient interest” *supra*, at 488. It was stated that “sex and obscenity are not synonymous”; that obscene material is only such material which “deals with sex in a manner appealing to prurient interest” *supra*, at 487.

There is not a single fact *alleged in the complaint* to show that the material allegedly being transported came within the standards aforesaid. The law here involved (18 U. S. C. 1465) does not set forth all the ingredients necessary to state the offense; to save its constitutionality there has been imported another element necessary to charge the offense: material which deals “with sex in a manner appealing to prurient interest”. In *United States v. Carll*, 105 U. S. 611, 612, it was stated:

“In an indictment upon a statute, *it is not sufficient to set forth the offense in the words of the statute,*

unless those words of themselves fully, directly, and expressly, *without any uncertainty or ambiguity*, set forth all the elements necessary to constitute the offense intended to be punished; and the fact that the statute in question, read in the light of the common law, and of other statutes on the like matter, enables the court to infer the intent of the legislature, *does not dispense with the necessity of alleging in the indictment all the facts necessary to bring the case within that intent.*" (Emphasis supplied).

In the light of the aforesaid, it appears clear that none of the essential facts constituting the offense charged was contained in the complaint. The complaint contained not only mere conclusions of law, but even failed to state an offense, let alone facts to prove the offense. Appellee concedes that the complaint must satisfy the requirements of Rules 3 and 4 of the Federal Rules of Criminal Procedure, 18 U. S. C. (App. Br. p. 9). Yet the very language of these rules refutes appellee's position that there has been a compliance with these rules. Rule 3 provides:

"The complaint is a written statement *of the essential facts constituting the offense charged*. It shall be made upon oath before a commissioner or other officer empowered to commit persons charged with offenses against the United States". (Emphasis supplied.)

Rule 4(a) provides:

"*If it appears from the complaint that there is probable cause to believe that an offense has been committed and that the defendant has committed it*, a warrant for the arrest of the defendant shall issue to any officer authorized by law to execute it" (Emphasis supplied.)

Thus, “probable cause” must appear “from the complaint” itself, and the “essential facts” must be stated in the complaint. In safeguarding fundamental rights, nothing is left to speculation, guess or surmises, nor to what might have been in the mind of the officer swearing to the complaint. Under these standards, the warrant which issued on the basis of the complaint here was invalid, as was the arrest made thereunder.

IV.

Replying to the Argument That the Arrests Were Valid Without a Warrant. (App. Br. pp. 12-14.)

Appellants do not accept appellee’s premise that even if the arrests were invalid because made under a void warrant, the arrests are nevertheless valid as if no warrants were executed.

The record, as we have shown, demonstrates that the arrests were made pursuant to the warrant, and the arresting officer declined to state that he would have made an arrest without one. Nor does the law support appellee’s position, apart from the factual situation. Moreover, since a void warrant was obtained, appellee cannot successfully argue that there was no time to obtain a valid one. Indeed, as appellee’s own statement of the case makes plain (App. Br. pp. 2-4), this was not a case of a “swiftly moving vehicle” fleeing from the scene of a crime. The automobile stopped at various “business establishments” [R. T. 67] and packages were allegedly delivered. There was ample time to obtain a valid warrant of arrest, if one was justified, and it was “unreasonable” within the terms of the Fourth Amendment not to obtain one.

If, however, for the purposes of argument, the validity of the arrests are considered as if no warrant was issued, it is submitted that appellee has failed to establish that the arresting officer had "reasonable grounds" for believing that appellants had committed or were committing a violation of 18 U. S. C. 1465. Appellee appears to have misread the standards enunciated in the cases upon which it relies. Thus, in *Carroll v. United States*, 267 U. S. 132, the Court held that before there can be probable cause for search and seizure, by the officers, "the facts and circumstances" must be within their knowledge and of which they had reasonably trustworthy information sufficient "in themselves" to warrant "a man of reasonable caution" in the belief that intoxicating liquor was being transported (p. 162). The Court added:

"It would be intolerable and unreasonable if a prohibition agent were authorized to stop every automobile on the chance of finding liquor and thus subject all persons lawfully using the highways to the inconvenience and indignity of such a search" (p. 154).

In *Binnegar v. United States*, 338 U. S. 160, the search was made by an officer who had arrested the defendant several months before for the same offense of transportation, and in addition the Court pointed out that:

"There was hearsay, *but there was much more*. Indeed, as we have emphasized, the facts derived from Malsted's *personal observations* were sufficient in themselves, without the hearsay concerning general reputation, to sustain his conclusion concerning the illegal character of Binnegar's operations" (p. 172) (emphasis supplied).

In *United States v. Branco*, 189 F. 2d 716 (C. A. 3, 1951), the Court stated:

“The agent who relies on the summary assertions of his co-agent can acquire therefrom no greater authority than could have been exercised by the co-agent had he been in the arresting agent’s position. A telephone message cannot immunize irresponsible investigation” (p. 719).

Appellee cannot dispute that its sole reliance here, to justify the arrest, is upon hearsay testimony. All that the arresting officer saw from his personal observation were “cardboard boxes of a brown or craft-type paper ‘filling up’ part of the car back of the front seat” [R. T. 56]. Clearly it is not a crime to have the rear of a car filled with boxes, as many an individual and businessman would attest. It would indeed be “intolerable and unreasonable” if police officers could stop every car and subject them to search because the cars were filled with cardboard boxes. Before the arrest was made, the officers had seen no “obscene” material, and therefore had observed no “interstate transportation” of such material. Only after the arrest was made, did one of the officers open up a box and state “you have quite a lot of pictures here, Weise” [R. T. 75].

In the light of the record, the appellee is compelled to rely on what the arresting officer was told in a telephone conversation with other agents prior to the arrest [R. T. 66]. This sole reliance on hearsay has the initial infirmity which stems from the weakness of such evidence. The reason for the rule against the use of hearsay testimony is “that the unsworn statement of a person not called as a witness or subjected to the test of cross-examination is not recognized as having a sufficient probative effect

to raise an inference that the fact is as stated" (31 C. J. S., *Evidence*, Section 193, p. 924). The only evidence therefore, upon which appellee relies here to draw the inference of "probable cause" that appellants committed the offense charged is evidence which the law ordinarily deems insufficient to give rise to such an inference.

Moreover, in this case it is conceded that not a single officer anywhere from his own knowledge or personal observation had any evidence that appellants were transporting "obscene" material. Despite the alleged constant surveillance of appellants from Los Angeles to Tacoma; despite the fact that boxes were allegedly delivered to various business establishments; not a single investigation had apparently been made, or if made, disclosed the sale or distribution of any "obscene" material. Appellee concedes even now that of the material seized, some 80% of the matter was not necessarily within the statutory proscription (App. Br. p. 5). The trial court, too, conceded that some of the material was "hardly of a character to be deemed obscene by the standards of this day and age" [R. T. 143]. Thus, the agents had not the slightest evidence prior to the arrests that "obscene" material was contained in the boxes, or that any such material had been transported, sold or distributed in violation of the statute. At most, the agents may have had information to warrant an investigation; they had no probative evidence to justify an arrest, search and seizure.

Appellee's case comes down to this: that the arresting officer was told by phone that some agent had been told by some informant that one of the respondents had told the informant in Los Angeles that his car was loaded with "the real stuff" [R. T. 66], and the agent was told that one of the respondents "had sold obscene photo-

graphs in Seattle a few months before that time at which time he was investigated but there was no proof of interstate transportation" [R. T. 67]. It is submitted that this was hardly the quality of proof necessary to establish reasonable grounds for believing that appellants had committed the offense for which they were convicted. The hearsay of the informant was thrice removed. The reliability of the informant, or the reasons for relying upon him were not shown. The alleged statement was plainly equivocal and ambiguous. The officer could not know whether the expression allegedly used was merely that which usually appears in newspapers and magazines exploiting some motion picture or novel or whether it was actually intended to constitute an admission that "obscene" material within the purview of the law was stored in the car. As to such alleged oral admissions, it has been stated by a learned authority: "But there is a general distrust of testimony reporting any extrajudicial *oral statements* alleged to have been made, including a party's admissions". (Wigmore, *Evidence* (3rd ed), IV, Section 1056, p. 17.) Nor was this vague and tenuous hearsay statement in any way buttressed by the stock reliance on reputation testimony.

In essence, the officers in this case had no evidence that the appellants were transporting "obscene" material in interstate commerce; no investigation was made to determine that fact; the officers acted solely on suspicion created by hearsay information; the warrant they obtained was invalid, and the attempt now to disregard it is fruitless, whether the arrests be considered pursuant to the warrant or without it. Since the arrests were purportedly made under federal authority (18 U. S. C. 3052) and the Federal Rules of Criminal Procedure and

the conviction obtained under a federal statute in the federal court, the failure to meet federal constitutional and statutory standards cannot be avoided by reference to state law (App. Br. p. 14). (*Constitution of the United States*, Art. VI, cl. 2 (Supremacy clause).)

Conclusion.

The judgments of conviction should be reversed. The arrests, search and seizure upon which the convictions were based were in violation of the provisions of the Fourth Amendment, and the convictions thus obtained deprive appellants of their liberty without due process of law in violation of the due process provisions of the Fifth Amendment. Judgments so obtained are inconsistent with the true administration of criminal justice in the Courts of the United States.

Respectfully submitted,

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No. 15505

In the United States Court of Appeals
for the Ninth Circuit

UNITED STATES OF AMERICA, APPELLANT

v.

FRANK L. SMITH, APPELLEE

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

BRIEF FOR THE UNITED STATES

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FILED

AUG 19 1957

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**In the United States Court of Appeals
for the Ninth Circuit**

No. 15505

UNITED STATES OF AMERICA, APPELLANT

v.

FRANK L. SMITH, APPELLEE

*ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON*

BRIEF FOR THE UNITED STATES

This action was brought by the United States to recapture meat subsidy payments which were made to appellee in 1945 under a meat subsidy program conducted in accordance with the first proviso of Section 2(e) of the Emergency Price Control Act of 1942, as amended (50 U.S.C. App. 902(e)). The payments, made on preliminary approval of appellee's subsidy claims, were subsequently invalidated by the Reconstruction Finance Corporation (RFC) (R. 3-8¹). The district court directed a verdict for appellee (R.

¹ References to the Transcript of Record printed on the appeal will be designated "R. —". References to Plaintiff's Exhibits Nos. 1 and 2, which were designated for printing but not printed, are to the exhibits themselves.

42), and on September 28, 1956 entered judgment on the verdict (R. 15-17). On November 5, 1956 the court entered an order denying appellant's motions for judgment notwithstanding the verdict and for a new trial (R. 18). The United States filed a notice of appeal from both the judgment and the order on January 2, 1957 (R. 18-19).

The jurisdiction of the district court rested upon 28 U.S.C. 1345. This Court's jurisdiction is invoked under 28 U.S.C. 1291.

STATEMENT OF THE CASE

The statutory background.—Section 2(e) of the Emergency Price Control Act of 1942, 56 Stat. 24, 50 U.S.C. App. (1946 Ed.) 902, authorized the Federal Loan Administrator to pay subsidies in such amounts and upon such terms and conditions as the Administrator, with the approval of the President, should determine to be necessary to obtain the required production of commodities previously determined by the President to be strategic or critical. The Section further provided that these subsidies were to be paid by corporations created and organized pursuant to Section 5(d) of the Reconstruction Finance Corporation Act, 48 Stat. 1108, as amended, 15 U.S.C. 606(b)(3). Meat having been defined by the President as a "strategic or critical material", Section 2(e) thus had the effect of empowering the Federal Loan Administrator, with the approval of the President, to make the determination of the need for subsidy payments to producers of this commodity. And under the Stabilization Act of 1942, 56 Stat. 756, as amended, 50 U.S.C. App. (1946 Ed.) 961, *et seq.*, as supplemented by Executive Order 9250 (7 F.R. 7871), the Director of Economic Stabilization

was given overriding policy authority over all price and stabilization agencies. In carrying out this authority, the Director on May 7, 1943, ordered the Federal Loan Administrator to initiate the Livestock Slaughter Subsidy Program. On the same day, the Federal Loan Administrator (who was also Secretary of Commerce), directed the President of the Defense Supplies Corporation, a corporation created pursuant to Section 5(d) of the Reconstruction Finance Corporation Act, to pay subsidies to livestock slaughterers, packers, and wholesalers. This directive was implemented by the issuance of Defense Supplies Corporation Regulation No. 3, which became effective June 7, 1943 (8 F.R. 10826), and which was reissued as Revised Regulation No. 3, effective January 19, 1945 (10 F.R. 4241). By Joint Resolution of June 30, 1945 (59 Stat. 310), Congress dissolved Defense Supplies Corporation and transferred its subsidy administration functions to Reconstruction Finance Corporation.

The large number of monthly subsidy claims (estimated to have been approximately 26,000) rendered it administratively impossible to make a rapid determination as to the accuracy or validity of each submitted claim. On the other hand, the prompt payment of claims was necessary in order to enable the slaughterers to continue operation. Accordingly, slaughterers were permitted to certify that their claims were accurate and that they had not wilfully violated any regulation of the Office of Price Administration or the War Food Administration during the monthly reporting period covered by the claims. The latter certification was required because, the subsidy program being an adjunct of price and distribution controls,

compliance with the regulations of related agencies was a condition precedent to entitlement to subsidy payments. Defense Supplies Corporation was authorized to pay, upon preliminary approval, duly certified subsidy claims.² The applicable regulations required, however, that RFC withhold or invalidate subsidies upon certification of the Office of Price Administration that it had been determined, in a court of first instance or by a hearing commissioner, that the slaughterer had violated a price regulation.³ D.S.C. Regulation No. 3, effective June 7, 1943, Section 10(a) (8 F.R. 10829); Revised Regulation No. 3, effective January 19, 1945, Section 7003.10 (a) (10 F.R. 4243), as amended by Amendment 3, effective May 5, 1945, 10 F.R. 8073 and 11153; Office of Economic Stabilization Directive 41, Section 7(b)(2) (10 F.R. 4494). See *infra*, pp. 22-23.

The facts of this case.—Appellee, a meat slaughterer doing business in Portland, Oregon, made claim for and received meat subsidies under this program (R. 26). In 1946, a hearing commissioner determined that appellee had violated the provisions of an applicable control order by slaughtering cattle and calves in excess of his quotas during the months of June, July and August, 1945 (letter, appellee to Slaughter Control Program, dated December 23, 1946, p. 1, third item in Plaintiff's Exhibit 2; see also R. 7-8). The Office of Price Administration certified this fact to RFC

² D.S.C. Regulation No. 3, effective June 7, 1943, Section 5(d) (8 F.R. 10827); Revised Regulation No. 3, effective January 19, 1945, Section 7003.9(c) (10 F.R. 4243).

³ The Price Administrator's functions with reference to the payment of subsidies were transferred to the Office of Temporary Controls upon the termination of OPA, and, upon termination of OTC, were given to Reconstruction Finance Corporation. Executive Order 9841, dated April 23, 1947 (12 F.R. 2645).

(*ibid.*). RFC, acting under the mandatory provisions of Section 7(b)(2) of Directive 41 of the Office of Economic Stabilization, thereupon invalidated the subsidy payments already made to appellee for those months in the amount of \$37,839.67 (R. 8). Of this amount, \$9,528.58 was recovered by application of the Government's claim to appellee's subsidy claim for June 1946, leaving a balance due on the Government's claim of \$29,244.74 (R. 8).

On December 15, 1950, appellee filed a telegraphic protest with RFC, requesting a review of the orders settling his subsidy account and stating that supporting data and further information would be submitted at an early date (first item in Plaintiff's Exhibit 2). According to RFC records, this protest was denied in a letter addressed to appellee dated June 25, 1951 (R. 7-8). The letter recited the administrative action which had been taken with respect to appellee's subsidy claims, and stated that "this should be considered a formal and final denial of your protest from which appeal lies only to a court having jurisdiction over such matters" (R. 8).

The Government filed its complaint seeking restitution of the invalidated subsidy payments on February 2, 1956 (R. 3-8), attaching the denial letter of June 25, 1951 to the complaint as Exhibit A (R. 7-8). Appellee's answer amounted to a general denial (R. 9). At the trial, appellee stipulated that he had filed the protest (R. 27) but denied receipt of RFC's denial letter (R. 29-30, 34).

At the close of the evidence, the Government moved for a directed verdict on the ground that the action of RFC in invalidating appellee's subsidy payments was

not subject to attack in the court below.⁴ The court denied this motion and instead granted appellee's motion for a directed verdict (R. 41-42).

The Government then moved for an order setting aside the verdict and for judgment in its favor, in accordance with its motion for a directed verdict (R. 14-15), suggesting at the same time that, if judgment were granted as prayed, the court might consider granting a stay of execution so that appellee might seek review of the invalidation of the subsidies in the Emergency Court of Appeals (see *infra*, p. 23). The court entered judgment on the verdict before passing on this motion (R. 15-17), and on October 1, 1956 the Government filed an alternative motion for a new trial (R. 17). On October 19, 1956, the Government filed a Supplemental Memorandum of Points and Authorities in which it again suggested that the court enter judgment for the United States but grant a stay to permit recourse to the Emergency Court of Appeals for a hearing on the merits, citing further authority for this course of action (see *infra*, pp. 23-25).

The district court rejected these suggestions and, in an order entered on November 5, 1956, denied both motions of the Government (R. 18). Notice of appeal from the judgment and order was filed on January 2, 1957 (R. 18-19).

⁴ With respect to appellee's alleged non-receipt of the letter denying his protest of this action, it was argued that even if appellee had not received the letter when it was first issued, he received it as an attachment to the complaint on February 8, 1956, and that appellee's failure to appeal the denial of his protest to the Emergency Court of Appeals within 30 days, as required by Section 204(a) of the Act, precluded any action by the court below which would have the effect of nullifying the order invalidating the subsidies (R. 32, 34, 39). We do not press this argument on this appeal.

STATUTES AND REGULATIONS INVOLVED

The applicable statutes and regulations are set forth in pertinent part in Appendix A, *infra*, pp. 19-23.

SPECIFICATION OF ERRORS

1. In this action by the Government to recover meat subsidy payments determined to be due it by an order of the Reconstruction Finance Corporation, the district court erred in entering a final judgment on the merits in favor of appellee.

2. The district court erred in failing to grant appellant's motion to set aside the verdict and for judgment for appellant, which motion was accompanied by the suggestion that the court stay execution of such a judgment pending final determination of the validity of the RFC order in the appropriate forum.

SUMMARY OF ARGUMENT

This is an action to enforce a debt created by an order of the RFC invalidating appellee's meat subsidy claims and demanding return of the subsidy payments which had been made upon a preliminary basis. Since such orders are issued under Section 2 of the Emergency Price Control Act of 1942, the validity of the order here in question is subject to review only in the Emergency Court of Appeals, under Section 204(d) of the Act. By entering judgment for appellee, however, the district court effectively invalidated the RFC order and destroyed the debt which the order created. In so doing the court plainly acted in excess of its jurisdiction.

The proper course for the district court to have followed was that urged upon it by the Government. At the trial, appellee insisted that he had never received

notice of the denial of his protest, and the Government was unable to prove that the notice of June 25, 1951 had in fact been mailed. As a matter of law, therefore, the protest had never been finally disposed of and was still pending before RFC. In these circumstances, the court below should have entered judgment for the Government as prayed, staying execution, however, to permit final action—administrative and, if necessary, judicial—disposing of the pending protest.

ARGUMENT

The District Court Should Have Entered Judgment for the Government, But Stayed Execution Pending a Final Determination, in the Proper Forum, of the Validity of the RFC Order Invalidating Appellee's Subsidy Claims.

A. *The District Court Was Without Jurisdiction to Take Any Action Which Would Affect the Validity of the Order of the Reconstruction Finance Corporation Invalidating Appellee's Subsidy Claims.*

Section 204(d) of the Emergency Price Control Act of 1942, *infra*, pp. 20-21, vests in the Emergency Court of Appeals "*exclusive jurisdiction* to determine the validity of any regulation or order issued under section 2 [of the Act] * * * and of any provision of any such regulation [or] order * * *" (emphasis added), adding that, "[e]xcept as provided in this section, no court, Federal, State, or Territorial, shall have jurisdiction or power to consider the validity of any such regulation [or] order * * *". Section 203 of the Act (*infra*, p. 20) provides that review of such regulations or orders may be sought by the filing of a protest with the issuing agency. If the protest is denied, the protestant "may, within thirty days after such denial, file a complaint with the Emergency Court of Appeals, * * * specifying

his objections and praying that the regulation [or] order * * * protested by enjoined or set aside in whole or in part”⁵ (Section 204(a), *infra*, p. 20). The validity of these provisions is well established. See, *e.g.*, *Yakus v. United States*, 321 U.S. 414, 429-430; *Samett v. Reconstruction Finance Corporation*, 165 F. 2d 605 (C.A. 10), certiorari denied, 334 U.S. 812; *Tambasco v. Reconstruction Finance Corporation*, 178 F. 2d 283 (C.A. 2); *Reconstruction Finance Corporation v. MacArthur Mining Co.*, 184 F. 2d 913, 917 (C.A. 8); *Swift & Co. v. Reconstruction Finance Corporation*, 183 F. 2d 456, 459 (C.A. 7); *Reconstruction Finance Corporation v. Burlison*, 171 F. 2d 329 (C.A. 5); *Duncan Coffee Co. v. Reconstruction Finance Corporation*, 178 F. 2d 926, 928-929 (Em. Ct. App.); *Merchants Packing Co. v. Reconstruction Finance Corporation*, 176 F. 2d 908, 912 (Em. Ct. App.).

The Livestock Subsidy Program was established pursuant to Section 2(e) of the Emergency Price Con-

⁵ Section 204(e)(1) of the statute also provided a second avenue for review by the Emergency Court. This section permitted courts in which enforcement actions, involving alleged violation of any regulation or order issued under Section 2, were brought pursuant to Section 205 of the Act or Section 37 of the Criminal Code, to grant the defendant leave to file a complaint against the Administrator in the Emergency Court contesting the validity of the regulation or order. Such leave was to be granted only in the event the court found “reasonable and substantial excuse for the defendant’s failure to present such objection in a protest filed in accordance with section 203(a) * * *”. An amendment to this section contained in the Supplemental Appropriation Act of July 30, 1947, 61 Stat. 619, terminated this jurisdiction except in a limited class of cases. *Woods v. Hills*, 334 U.S. 210; *Silver Pine Oil Co. v. Reconstruction Finance Corporation*, 205 F. 2d 835 (Em. Ct. App.); *Service Pipe Line Co. v. Reconstruction Finance Corporation*, 217 F. 2d 312 (Em. Ct. App.). This amendment makes it plain that this second avenue of review would not be available to appellee in the present case.

trol Act of 1942. Accordingly, an order invalidating a meat subsidy claim is an "order issued under section 2" within the meaning of the protest and exclusive review provisions of Sections 203 and 204(a) and (d) of the Act. *United States v. Bass*, 215 F. 2d 9 (C.A. 8); *Riverview Packing Co. v. Reconstruction Finance Corporation*, 207 F. 2d 415 (Em. Ct. App.); *Armour & Co. v. Reconstruction Finance Corporation*, 162 F. 2d 918 (Em. Ct. App.); *Belle City Packing Co. v. Reconstruction Finance Corporation*, 169 F. 2d 413 (Em. Ct. App.); *Wm. Schluderberg-T. J. Kurdle Co. v. Reconstruction Finance Corporation*, 169 F. 2d 419 (Em. Ct. App.), certiorari denied, 335 U.S. 846; *Merchants Packing Co. v. Reconstruction Finance Corporation*, *supra*; *Berchem v. Reconstruction Finance Corporation*, 191 F. 2d 922 (Em. Ct. App.).⁶ It is clear that, in the present case, RFC's mandatory invalidation of appellee's subsidy claims, pursuant to the Office of Price Administration's certification, constituted such an "order", as appellee recognized when he filed his protest seeking review of "the orders settling * * * livestock slaughter payment account" (telegram dated December 15, 1950, first item in Plaintiff's Exhibit 2). Cf. *United States v. Bass*, 215 F. 2d 9, 13 (C.A. 8); *Reconstruction Finance Corporation v. Service Pipe Line Co.*, 198 F. 2d 775 (C.A. 10); see also *Riverview Packing Co. v. Reconstruction Finance Corporation*, 207 F. 2d 361, 366 (C.A. 3); *Merchants Packing Co. v. Reconstruction Finance Corporation*, *supra*; *Riverview Packing Co. v. Reconstruction Finance Corporation*, 207 F. 2d 415 (Em. Ct. App.);

⁶ These cases thoroughly discuss the origin, legal basis, purposes and mechanisms of the meat subsidy program, as well as outlining the procedures involved in the invalidation and recapture of meat subsidy payments.

Armour & Co. v. Reconstruction Finance Corporation, supra; Somerville Dressed Meat Co. v. Reconstruction Finance Corporation, 159 F. 2d 716 (Em. Ct. App.); Silver Pine Oil Co. v. Reconstruction Finance Corporation, 205 F. 2d 835 (Em. Ct. App.).

The district court therefore had no jurisdiction to take any action which would adversely affect the validity of this order, or which would prevent or impede the enforcement of the debt created by that order.

B. The Judgment of the District Court in Favor of Appellee in Effect Constituted an Invalidation of the Order of the Reconstruction Finance Corporation in Excess of the Court's Jurisdiction.

The Government filed its complaint in this case on the basis of information in its files demonstrating that on December 15, 1950, appellee had protested the order invalidating his subsidy claims, and that on June 25, 1951, RFC had denied this protest in a letter-order addressed to appellee ⁷ (R. 7-8). At the trial, appellee stipulated that he had filed the protest (R. 27),

⁷In the normal course of events in cases of this kind, the Government follows the filing of the complaint with a motion for summary judgment, grounded on the district court's lack of jurisdiction to review the validity of the RFC orders and on the absence of factual issues. Such a motion was not filed in this case because appellee's Answer to Plaintiff's Request for Admission of Facts and Authenticity of Documents denied both the receipt of a claim receivable based upon the invalidation of the subsidy claims and receipt of the letter of June 25, 1951, denying the protest, thus raising factual issues (answers to requests for admissions numbered 5, 6, and 9, R. 10-13). That appellee had in fact received notice of the invalidation of his subsidies and of the claim receivable was, of course, demonstrated by his telegram protesting "* * * against the settlement of the livestock slaughter payments account * * *" and against "* * * the orders entered with respect to the subsidy payments as hereinbefore indicated * * *" (first item in Plaintiff's Exhibit 2, p. 1). This left a factual issue as to the receipt of the denial of protest.

but he persisted in denying that he had received the letter-order (R. 29-30, 34). In view of the lapse of more than five years between the dates of the letter-order and the trial, the normal difficulties encountered in attempting to prove the mailing of a letter, and the added obstacles created by personnel changes and administrative reorganization in closing out the expired subsidy program, the Government was unable to offer any evidence bearing upon the question of whether or not the letter of June 25, 1951 had in fact been either deposited in the mails by RFC or received by appellee.

Under the rule announced in *Amodio v. Reconstruction Finance Corporation*, 191 F. 2d 862 (Em. Ct. App.), the Government's failure of proof on this score constituted a failure to show any administrative action disposing of appellee's protest. That case held that a letter notifying the protestant of the denial of his protest takes effect as an order of denial only upon its deposit in the mails. As a matter of law, therefore, at the time of the trial the protest was still pending before RFC and the validity of the protested order had not yet been determined. In these circumstances, the district court, in this action based upon the still-outstanding RFC order establishing the debt of the defendant to the Government, directed a verdict for the defendant and entered judgment thereon.

We submit that in thus refusing to give effect to the order upon which the cause of action was based, the court below effectively invalidated the order and destroyed the debt which the order created. This action of the court was plainly in excess of its jurisdiction and an invasion of the exclusive province of the

Emergency Court of Appeals. See cases cited *supra*, pp. 9-11.

C. *The Course of Action Suggested to the District Court by the Government Was the Proper One to Adopt in the Circumstances of this Case.*

Despite the Government's failure to prove that final administrative action had been taken on appellee's protest, the proper course for the district court in the circumstances of this case was to enter judgment for the United States, in accordance with either its motion for a directed verdict or its subsequent motion for judgment notwithstanding the verdict, and to stay execution of the judgment, pending final disposition of appellee's protest by RFC and, if necessary, an appeal to the Emergency Court of Appeals.⁸ This was essentially the course urged upon the court below by the Government in its Memorandum of Points and Authorities in Favor of Plaintiff's Motion for Judgment Notwithstanding the Verdict and in its Supplemental Memorandum (*infra*, pp. 23-25). As authority for this procedure, the cases of *Silver Pine Oil Company v. Reconstruction Finance Corporation*, 205 F. 2d 835 (Em. Ct. App.), and *Reconstruction Finance Corporation v. Service Pipe Line Co.*, 198 F. 2d 775 (C.A. 10),

⁸Such a procedure would have been in accord with that required by statute in proceedings brought pursuant to the enforcement provisions of Section 205 of the Act or Section 37 of the Criminal Code. Section 204(e)(2) of the Act (*infra*, p. 21) provides that in any such proceeding involving an alleged violation of a regulation or order, "the court shall stay the proceeding * * * during the pendency of any protest properly filed by the defendant under section 203 * * * prior to the institution of the" enforcement proceeding (emphasis added). Such stays are to be granted, however, only after judgment and upon application made within five days after judgment.

were cited to the court (see *infra*, pp. 24-25). A brief outline of these cases will serve to show their applicability to the situation before the court below.

In *Silver Pine*, RFC had filed a civil suit in the district court to recover oil subsidies paid to Silver Pine. The claim was based upon a letter-order, demanding refund of the subsidy payments, which Silver Pine had not protested. The district court, ruling that it had no jurisdiction to review the validity of the letter-order, granted judgment for RFC but stayed execution and granted leave to Silver Pine to file an original complaint in the Emergency Court of Appeals, under Section 204(e)(1) of the Act, contesting the validity of the letter-order. The Emergency Court dismissed this complaint on the ground that it no longer had jurisdiction in such cases other than through an appeal from the denial of a protest under Section 204(a) of the Act (see *supra*, p. 9, fn. 5). The court therefore suggested the following procedure (205 F. 2d at 837):

* * * Silver Pine Oil⁴ Company may not be wholly without remedy in the present situation. For it would seem to be still possible for it to protest the letter order of April 13, 1948 and, if its protest is denied, to secure a judicial determination of the validity of that order by this court under Section 204(a) of the Act. If such a determination should ultimately be made in its favor it would appear that Silver Pine Oil Company would be entitled to have the judgment of the district court vacated under Section 204(e)(2) of the Act. Such relief could be granted by the court on motion under Fed. Rules Civ. Proc. rule 60(b)(6), 26

U.S.C.A. It may well be, therefore, that if Silver Pine Oil Company should promptly file a protest against the letter order of April 13, 1948 the district court, upon a proper showing, might stay execution of its judgment under Civil Procedure Rule 62(b) pending the termination of the protest proceeding. * * *

This suggested course was followed by Silver Pine, which filed its protest with RFC and obtained an order from the district court staying execution of the earlier judgment. After RFC denied the protest, Silver Pine sought review in the Emergency Court, which held the order invalid and set it aside. *Silver Pine Oil Co. v. Reconstruction Finance Corporation*, 222 F. 2d 721 (Em. Ct. App.).

The Service Pipe Line cases are particularly apposite here, since in RFC's suit against Service to recover oil subsidies, based upon an order invalidating the subsidies, the district court gave judgment for Service, on a ruling that Service was in fact entitled to the subsidies. On appeal, the Court of Appeals for the Tenth Circuit held that this ruling exceeded the jurisdiction of the district court because it invalidated the RFC order. The court of appeals therefore reversed and remanded, with directions to enter judgment for RFC as prayed. The district court was further ordered to stay execution of the judgment pending disposition of an ancillary suit in the Emergency Court of Appeals, filed pursuant to Section 204(e) of the Act, attacking the validity of the RFC order, should Service apply for leave to file such a suit. *Reconstruction Finance Corporation v. Service Pipe Line Co.*, 198 F. 2d 775 (C.A. 10); see also 206 F. 2d 814 (C.A. 10). Pursuant

to leave granted by the district court, Service filed a complaint which was dismissed by the Emergency Court for lack of jurisdiction, on the authority of its first *Silver Pine* ruling. "After that," noted the Emergency Court, "Service Pipe Line Company, following our suggestion in the Silver Pine Oil Company case, filed its protest with RFC against the letter-order" invalidating its subsidies. *Service Pipe Line Co. v. Reconstruction Finance Corporation*, 217 F. 2d 312, 318 (Em. Ct. App.). RFC denied the protest and Service filed its complaint in the Emergency Court. That court held the order invalid and set aside both the invalidation order and the order denying the protest. 217 F. 2d at 319.

Other cases furnish similar support for our position below and on this appeal. In *Woods v. Hills*, *supra*, the Supreme Court, in noting that the protest procedures were still available to defendants as a means of testing the validity of rent orders, stated that "[o]f course the District Court can withhold judgment so that it may give effect to any determination by the Housing Expediter or the Emergency Court of Appeals that might result from the defendant's pursuit of this remedy". 334 U.S. at 218, fn. 9.

United States v. Bass, *supra*, was a suit by RFC to recapture meat subsidy payments. Bass had protested the RFC invalidation order and RFC denied the protest on June 25, 1951. On July 26, 1951, Bass sought review by filing a complaint in the Emergency Court of Appeals. While this complaint was pending, the Government filed its recapture action in the district court. Upon the Emergency Court's dismissal of the complaint for late filing, the district court entered summary judgment for RFC. On appeal, the Court

of Appeals for the Eighth Circuit stated (215 F. 2d at 14):

* * * when this case came to trial in the District Court and the validity of the RFC's order was questioned, the only proper course for that court to pursue was to defer to the action of the Emergency Court of Appeals. And if the latter court had not passed upon the validity of the order it would have been appropriate for the court to hold the case in abeyance, as was ordered done by the Tenth Circuit in *Reconstruction Finance Corp. v. Service Pipe Line Co.*, 198 F. 2d 775, pending expeditious determination of the question in the Emergency Court of Appeals under Section 204(e) of the Act as amended, 61 Stat. 619, 50 U.S.C.A. Appendix, § 924(e).⁹

⁹ In an unreported subsidy recapture case, *United States v. Baellow*, still pending as No. 9067 in the District Court for the Western District of Missouri, Western Division, the defendant had failed to protest the RFC order invalidating his meat subsidy claims. After the Government filed suit the defendant filed a protest with RFC and moved in the district court for a stay of the proceedings. Judge (now Mr. Justice) Charles E. Whittaker granted the motion staying the proceedings "for such time as will allow defendant a reasonable opportunity to exhaust his administrative remedies, already begun, of protesting to Reconstruction Finance Corporation * * * and, if * * * unsuccessful, any available appellate remedy * * *".

CONCLUSION

In the light of the foregoing authorities, we respectfully request that the judgment of the court below be reversed and the case remanded, with directions to the district court to enter judgment for the United States, subject to being vacated should either of the forums having jurisdiction to pass upon the merits of the Government's claim, as embodied in the RFC order, determine that the claim is invalid. The district court should be further directed to stay execution of this judgment, pending such reconsideration as the General Services Administration, successor to RFC in this matter,¹⁰ may deem it necessary to give to appellee's protest before making a final and effective disposition thereof; and pending such efforts to seek review in the Emergency Court of Appeals as may prove necessary or as appellee may deem advisable.

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AUGUST, 1957.

¹⁰ RFC was dissolved, effective at the close of June 30, 1957, and its functions in connection with the matters here at issue were transferred to the Administrator of the General Services Administration, pursuant to the provisions of Reorganization Plan No. 1 of 1957, July 2, 1957, 22 F.R. 4633.

APPENDIX A

1. The pertinent provisions of the Emergency Price Control Act of 1942, 56 Stat. 23, as amended, 50 U.S.C. App. (1946 Ed.) 901, *et seq.* are as follows:

Section 2 [50 U.S.C. App. 902]

* * * * *

(e) Whenever the Administrator determines that the maximum necessary production of any commodity is not being obtained or may not be obtained during the ensuing year, he may, on behalf of the United States, without regard to the provisions of law requiring competitive bidding, buy or sell at public or private sale, or store or use, such commodity in such quantities and in such manner and upon such terms and conditions as he determines to be necessary to obtain the maximum necessary production thereof or otherwise to supply the demand therefor, or make subsidy payments to domestic producers of such commodity in such amounts and in such manner and upon such terms and conditions as he determines to be necessary to obtain the maximum necessary production thereof: *Provided*, That in the case of any commodity which has heretofore or may hereafter be defined as a strategic or critical material by the President pursuant to section 5d of the Reconstruction Finance Corporation Act, as amended, such determinations shall be made by the Federal Loan Administrator with the approval of the President, and, notwithstanding any other provision of this Act or of any existing law, such commodity may be bought or sold, or stored or used, and such subsidy payments to domestic producers thereof may be paid, only by corporations created or organized pursuant to such section 5d; * * *

Section 203 [50 U.S.C. App. 923]

(a) At any time after the issuance of any regulation or order under section 2, or in the case of a price schedule, at any time after the effective date thereof specified in section 206, any person subject to any provision of such regulation, order, or price schedule may, in accordance with regulations to be prescribed by the Administrator, file a protest specifically setting forth objections to any such provision and affidavits or other written evidence in support of such objections. * * *

Section 204 [50 U. S. C. App. 924]

(a) Any person who is aggrieved by the denial or partial denial of his protest may, within thirty days after such denial, file a complaint with the Emergency Court of Appeals, created pursuant to subsection (c), specifying his objections and praying that the regulation, order, or price schedule protested be enjoined or set aside in whole or in part. * * * Upon the filing of such complaint the court shall have exclusive jurisdiction to set aside such regulation, order, or price schedule, in whole or in part, to dismiss the complaint, or to remand the proceeding. * * *

* * * * *

(d) * * * The Emergency Court of Appeals, and the Supreme Court upon review of judgments and orders of the Emergency Court of Appeals, shall have exclusive jurisdiction to determine the validity of any regulation or order issued under section 2, of any price schedule effective in accordance with the provisions of section 206, and of any provision of any such regulation, order, or price

schedule. Except as provided in this section, no court, Federal, State, or Territorial, shall have jurisdiction or power to consider the validity of any such regulation, order, or price schedule, or to stay, restrain, enjoin, or set aside, in whole or in part, any provision of this Act authorizing the issuance of such regulations or orders, or making effective any such price schedule, or any provision of any such regulation, order, or price schedule or to restrain or enjoin the enforcement of any such provision.

(e) * * *

(2) In any proceedings brought pursuant to section 205 of this Act * * * or section 37 of the Criminal Code, involving an alleged violation of any provision of any such regulation, order or price schedule, the court shall stay the proceeding—

* * * * *

(ii) during the pendency of any protest properly filed by the defendant under section 203 * * * prior to the institution of the proceeding under section 205 of this Act * * * or section 37 of the Criminal Code, setting forth objections to the validity of such provision which the court finds to have been made in good faith; and

(iii) during the pendency of any judicial proceeding instituted by the defendant under this section with respect to such protest or instituted by the defendant under paragraph (1) of this subsection with respect to such provision, and until the expiration of the time allowed in this section for the taking of further proceedings with respect thereto.

Notwithstanding the provisions of this paragraph, stays shall be granted thereunder in civil proceed-

ings only after judgment and upon application made within five days after judgment. * * *

2. Defense Supplies Corporation Revised Regulation No. 3, effective January 19, 1945 (10 F.R. 4243), as amended by Amendment No. 3, effective May 5, 1945 (10 F.R. 8073 and 11153), provides in pertinent part as follows:

Section 7003.9(c). *Frequency.* Payments will be made monthly upon preliminary approval of the claim.

* * * * *

Section 7003.10(a). *Compliance with Other Regulations.* Defense Supplies Corporation shall declare invalid, in whole or in part, any claim by an applicant who, in the judgment of the War Food Administrator or the Price Administrator, has wilfully violated any regulation or order of their respective agencies applicable to the purchase or sale of livestock or to livestock slaughter or to the sale or distribution of meat, and any claim of any applicant who the Price Administrator certifies to Defense Supplies Corporation has been determined in a civil proceeding to have violated a substantive provision of any regulation or order of the Office of Price Administration applicable to the purchase or sale of livestock or to livestock slaughter or to the sale or distribution of meat.

3. Directive 41 of the Office of Economic Stabilization (10 F.R. 4494), provides in pertinent part as follows:

Section 7 (b) (2). Upon a *nisi prius* determination in a civil action or proceeding (including a proceeding before a hearing commissioner) against

a subsidy applicant, that such applicant has violated any substantive provision of an Office of Price Administration meat or livestock regulation or order, the Office of Price Administration shall certify the determination to Defense Supplies Corporation, including the period of time during which the violation is found to have occurred. Defense Supplies Corporation shall thereupon withhold payment of all subsidy claims of the applicant for the accounting period in which the violation is found to have occurred.

APPENDIX B

1. The Memorandum of Points and Authorities in Favor of Plaintiff's Motion for Judgment Notwithstanding the Verdict, filed on September 26, 1956, reads as follows in pertinent part:

* * * it is agreed that in the event the Court grants judgment as prayed for in plaintiff's motion, the defendant might desire to seek a stay of the execution of judgment, pending an attempt on the part of the defendant to get a hearing in the Emergency Court of Appeals. If such a motion is filed under such circumstances, the Court might, in the exercise of its discretion, consider the granting of such a stay of execution of the judgment.

2. The Plaintiff's Supplemental Memorandum of Points and Authorities, filed on October 19, 1956, as a supplement to the Memorandum of Points and Authorities in Favor of Plaintiff's Motion for Judgment Notwithstanding the Verdict, reads as follows:

On Page 7 of Plaintiff's Memorandum of Points and Authorities in the above entitled matter it was suggested that in the event the Court granted Plaintiff's motion for judgment, notwith-

standing the verdict, defendant might at that time move for a stay of the execution of the judgment to allow him to appeal to the Emergency Court of Appeals if he deemed that move desirable, under the authority of *Silver Pine Oil Company v. RFC*, 205 F2d 835.

In a case somewhat similar to this one, but arising out of the oil well subsidy program, the Court of Appeals for the Tenth Circuit utilized this procedure as a means of accomplishing substantial justice. The case of *RFC v. Service Pipeline Company*, 198 F2d 775 (CCA 10, 1952) held on rehearing that a letter from the RFC which was claimed by RFC to be a final order depriving the District Court of jurisdiction had been made a part of the record as though it was attached to the complaint. The Court stated on page 781:

“So considered, the amended complaint, as of the date of this opinion, constitutes an action for the enforcement of the order, determining that appellees were not entitled to the subsidy payments, and this action to enforce shall be deemed to have been commenced as of the date of the mandate of this Court.”

The Court reversed the judgment and remanded the cause with directions to enter judgment for appellant RFC as prayed for in its complaint, provided however that if the defendant Service Pipe Line should apply to the District Court for leave to file in the Emergency Court a complaint against RFC attacking the validity of the order, the judgment should be stayed pending disposition of the proceedings in the Emergency Court of Appeals.

Since the most defendant can demand is a hearing in this matter, it is suggested that this Court

might utilize the authority of *RFC v. Silver Pipe Line Co.*, supra, and *Silver Pine Oil v. RFC*, supra, to grant judgment to the United States in this case with a stay of the execution of judgment to enable the defendant to petition the Emergency Court of Appeals for a hearing on the merits.

No. 15505

United States
Court of Appeals
For the Ninth Circuit

UNITED STATES OF AMERICA, APPELLANT

vs.

FRANK L. SMITH, APPELLEE

Brief for Appellee

On Appeal from the United States District Court
for the District of Oregon

MAGUIRE, SHIELDS, MORRISON & BAILEY
WALTER J. COSGRAVE,
H. KENT HOLMAN
Attorneys for Appellee.

FILED

NOV 18 1957

PAUL P. O'CONNOR, CLERK

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United States
Court of Appeals
For the Ninth Circuit

UNITED STATES OF AMERICA, APPELLANT

vs.

FRANK L. SMITH, APPELLEE

Brief for Appellee

On Appeal from the United States District Court
for the District of Oregon

STATEMENT OF THE CASE

This action was brought by the United States to recover meat subsidy payments made to appellee during the months of June, July and August, 1945. The subsidy payments made were subject to recapture should it be determined later that appellee had violated any regulation of the Office of Price Administration or the War Food Administration during the monthly reporting period covered by the claims.

Appellee, a meat slaughterer doing business in Portland, Oregon, received subsidies to alleviate the

price squeeze upon slaughterers caused by uncontrolled live cattle prices and controlled prices on meat.

These subsidies were paid under the following statutory and regulatory authority: Section 2(e) of the Emergency Price Control Act of 1942, 56 Stat. 24, 50 U.S.C. App. (1946 Ed.) 902, authorized the Federal Loan Administrator to pay subsidies in such amounts and upon such terms and conditions as the Administrator, with the approval of the President, should determine to be necessary to obtain the required production of commodities previously determined by the President to be strategic or critical. Section 2(e) of the Act above further provided that the subsidies should be paid by corporations created and organized pursuant to Section 5(d) of the Reconstruction Finance Corporation Act, 48 Stat. 1108, as amended, 15 U.S.C. 606 (b) (3). Meat was defined by the President as a "strategic or critical material;" this had the effect of empowering the Federal Loan Administrator under Section 2(e), with the approval of the President, to make a determination of the need for subsidy payments to producers of meat. Under the Stabilization Act of 1942, 56 Stat. 756, as amended, 50 U.S.C. App. (1946 Ed.) 961, et seq., as supplemented by Executive Order 9250 (7 F.R. 7871), the Director of Economic Stabilization was given overriding policy authority over all price and stabilization agencies. In carrying

out this authority, the Director on May 7, 1943, ordered the Federal Loan Administrator to initiate the Livestock Slaughter Subsidy Program. On the same day, the Federal Loan Administrator (who was also Secretary of Commerce), directed the President of the Defense Supplies Corporation, a corporation created pursuant to Section 5(d) of the Reconstruction Finance Corporation Act, to pay subsidies to livestock slaughterers, packers, and wholesalers. This directive was implemented by the issuance of Defense Supplies Corporation Regulation No. 3, which became effective June 7, 1943 (8 F.R. 10826), and which was reissued as Revised Regulation No. 3 effective January 19, 1945 (10 F.R. 4241). By Joint Resolution of June 30, 1945 (59 Stat. 310), Congress dissolved Defense Supplies Corporation and transferred its subsidy administration functions to Reconstruction Finance Corporation.

The subsidy payments in question were made to appellee after appellee had certified that his claims were accurate and that he had not wilfully violated any regulation of the Office of Price Administration or War Food Administration during the monthly reporting period covered by the claims. It was necessary for appellee to make such a certification because compliance with the regulations of the Office of Price Administration and the War Food Administration was a condition precedent to payment of subsidies. Defense Supplies Corporation

was authorized to pay, upon preliminary approval, duly certified subsidy claims.¹ The applicable regulations required the RFC to withhold or invalidate subsidies upon certification by the Office of Price Administration that it had been determined, in a court of first instance or by a hearing commissioner, that the slaughterer had violate a price regulation.² D.S.C. Regulation No. 3, effective January 19, 1945, Section 7003.10(a) (10 F.R. 4243), as amended by Amendment 3, effective May 5, 1945, 10 F.R. 8073 and 11153; Office of Economic Stabilization Directive 41, Section 7(b) (2) (10 F.R. 4494).

In 1946, a hearing commissioner determined that appellee had violated the provisions of Control Order No. 1 of the Office of Price Administration by slaughtering cattle and calves in excess of his quotas for June, July and August, 1945. The Office of Price Administration certified this fact to RFC, and RFC, pursuant to Section 7(b) (2) of Directive 41 of the Office of Economic Stabilization, invalidated subsidy payments made to appellee for the months of June, July and August, 1945, in the amount of \$37,839.67 (R. 8).³ The Government re-

-
1. D.S.C. Regulation No. 3, effective June 7, 1943, Section 5(d) (8 F.R. 10827); Revised Regulation No. 3, effective January 19, 1945, Section 7003.9(c) (10 F.R. 4243).
 2. The Office of Price Administration's functions concerning the payment of subsidies were transferred to the Office of Temporary Controls upon the termination of OPA, and, upon termination of OTC, were given to Reconstruction Finance Corporation. Executive Order 9841, dated April 23, 1947 (12 F.R. 2645).
 3. References to the Transcript of Record printed on the appeal will be designated "R.—".

duced this claim \$9,528.58 by applying appellee's subsidy claim due for June, 1946, leaving a balance, which the Government now claims is due and owing, of \$29,244.74 (R. 8).

This brings the case up to more recent events, when on December 15, 1950, appellee filed a telegraphic protest with the RFC against the invalidation of his subsidy claims (first item of Plaintiff's Exhibit 2). The Government filed the present complaint on February 2, 1956, to reclaim the invalidated subsidy payments (R. 3-8). Attached to the complaint as Exhibit A was a copy of a letter from the RFC's files dated June 25, 1951 (R. 7-8), denying appellee's telegraphic protest of December 15, 1950. At the trial, appellant was unable to prove that the RFC had ever mailed the letter dated June 25, 1951, or any letter denying appellee's protest. Further, appellee denied ever receiving a letter from the RFC denying his protest (R. 29-30, 34).

On the basis of this record the court granted appellee's motion for a directed verdict (R. 41-42).

Appellant moved for a directed verdict (R. 32) and, after this motion was denied and appellee's motion for directed verdict was granted, appellant moved for an order setting aside the verdict and for judgment N.O.V., which was denied (R. 34-35). On October 1, 1956, appellant filed an alternative motion for new trial, and on October 19, 1956, the appellant filed a Supplemental Memorandum of Points

and Authorities in which it was suggested that the court enter judgment for the appellant but grant a stay to permit appellee to appeal to the Emergency Court of Appeals. In an order entered November 5, 1956, the court denied appellant's latter two motions (R. 18). Appellant filed notice of appeal on January 2, 1957 (R. 18-19).

STATUTES INVOLVED

The applicable statutes are set forth in pertinent part in the Appendix, *infra*, pp. 15-17.

SUMMARY OF ARGUMENT

During the course of the proceedings here involved, the appellant made various motions as follows: Motion for directed verdict (R. 32); motion for an order setting aside the verdict and for judgment N.O.V. (R. 34-35); motion for new trial, made October 1, 1956; and motion for judgment in favor of the United States with a stay of execution thereof so as to enable appellee to appeal to the Emergency Court of Appeals, made October 19, 1956. The court properly denied all these motions and just as properly granted appellee's motion for a directed verdict (R. 41-42).

Appellant was unable to prove that the RFC had ever mailed a letter denying appellee's telegraphic protest of December 15, 1950. Appellee denied ever having received a letter from the RFC denying his protest. With the record in such a state, the court

could not render a judgment in favor of appellant enforcing the collection of a debt. The appellant had no cause of action because there had never been a denial by the RFC of appellee's protest. One of the grounds argued for a directed verdict in favor of appellee was that appellant had no cause of action (R. 35). The directed verdict for appellee was properly granted on this ground.

ARGUMENT

The District Court Could Not Enter Judgment for the Government and Stay Execution Pending a Final Determination in the Emergency Court of Appeals, But Had to Direct a Verdict in Favor of Appellee and Enter Judgment Thereon.

A. The Reconstruction Finance Corporation Has Never Denied Appellee's Protest.

Section 203(a) of the Emergency Price Control Act of 1942 (56 Stat. 31) (58 Stat. 638) (50 U.S.C. App. 923) is as follows:

“At any time after the issuance of any regulation or order under section 2, or in the case of a price schedule, at any time after the effective date thereof specified in section 206, any person subject to any provision of such regulation, order, or price schedule may, in accordance with regulations to be prescribed by the Administrator, file a protest specifically setting forth objections to any such provision and affidavits or other written evidence in

support of such objections. Statements in support of any such regulation, order, or price schedule may be received and incorporated in the Transcript of the proceedings at such times and in accordance with such regulations as may be prescribed by the Administrator. Within a reasonable time after the filing of any protest under this subsection, but in no event more than thirty days after such filing, the Administrator shall either grant or deny such protest in whole or in part, notice such protest for hearing, or provide an opportunity to present further evidence in connection therewith. In the event that the Administrator denies any such protest in whole or in part, he shall inform the protestant of the grounds upon which such decision is based, and of any economic data and other facts of which the Administrator has taken official notice."

Pursuant to Section 203(a) of the Act above, appellee filed a telegraphic protest on December 15, 1950, with the Administrator of the RFC, protesting the order of the RFC invalidating subsidy payments for the months of June, July and August, 1945, and June, 1946. Section 203(a) of the Act above requires the RFC to act upon appellee's protest within thirty (30) days. There is no showing that the RFC has ever acted on appellee's protest of December 15, 1950, and there is no showing that the RFC has ever mailed a letter denying appellee's protest or that appellee has ever received a letter from the RFC deny-

ing his protest. In such a case there has not been a denial of appellee's protest as required by Sec. 203(a) of the Act above.

The case of *Amodio v. Reconstruction Finance Corporation*, 191 F. (2d) 862 (Em. Ct. App.), was concerned with whether Amodio had appealed to the Emergency Court of Appeals within the thirty (30) day period allowed by Section 204(a) of the Emergency Price Control Act of 1942, (50 U.S.C. App. 924) *infra*, pp. 10-11. According to Section 204(a) of the Act, an appeal to the Emergency Court of Appeals must be filed within thirty (30) days after the denial of a protest by the RFC. To determine whether Amodio had appealed within the time allowed, it was necessary to determine when the RFC had made an effective denial of Amodio's protest.

The following is a portion quoted from page 864 of the opinion:

"A question remains as to when the act of denial of the protest by the respondent actually took place. If the agency had made and entered on its records a formal order of denial, as was the practice of the Price Administrator, the date of denial would undoubtedly be the date on which such order was entered. But here the respondent merely wrote a letter to the complainant's counsel which, it stated, 'should be considered a formal and final denial of your protest.' We do not think that a mere letter can be said to constitute final and definitive action on the

part of the writer until it is committed to the mails. Until then it is wholly subject to modification or recall at the writer's will.

Accordingly where, as here, the respondent follows the informal procedure of denying the complainant's protest by a letter addressed to his counsel, the date which the letter bears is not necessarily the date of denial. For the date of a letter is customarily the date of writing. While it is usually the date of mailing also it frequently appears that a letter is not actually mailed until a later date. And if a letter denying a protest was not in fact mailed until a later date than the one it bears we are satisfied that the date of actual mailing must be regarded as the date of the denial of the protest."

The holding of the court in the Amodio case, as the writer interprets it, is that there has not been final action on a protest until the RFC mails a letter of denial. In effect there is no denial of a protest until a letter of denial is deposited in the mails.

In our case, where there is no proof of mailing or receipt, there never has been an effective denial by the RFC of appellee's protest.

B. Appellee Has No Right to Appeal to the Emergency Court of Appeals.

The pertinent part of Section 204(a) of the Emergency Price Control Act of 1942, (50 U.S.C. App. 924(a)), is as follows:

“Any person who is aggrieved by the denial or partial denial of his protest may, within thirty days after such denial, file a complaint with the Emergency Court of Appeals, created pursuant to subsection (c) of this section, specifying his objections and praying that the regulation, order, or price schedule protested be enjoined or set aside in whole or in part * * *.”

It is apparent from reading the above quoted part of Section 204(a) of the Act that there must be a denial by the RFC of a protest before an appeal may be taken to the Emergency Court of Appeals. In this case there has been no denial by the RFC, therefore appellee has no right to appeal to the Emergency Court of Appeals.

C. The District Court Could Not Enter Judgment for the Government and Stay Execution Pending a Final Determination in the Emergency Court of Appeals.

The appellant, to support the affirmative of the above statement, cites two cases: *Silver Pine Oil Company v. Reconstruction Corporation*, 205 F. 2d 835 (Em. Ct. App.), and *Reconstruction Finance Corporation v. Service Pipe Line Co.*, 198 F. 2d 775 (C. A. 10). These cases are readily distinguishable from the case before this court. The pertinent facts are identical in the two cases above cited so the following statement will be phrased in the singular but shall be applicable to both cases. A letter order was

mailed by the RFC demanding a refund of subsidies paid. The letter order was admittedly received and was not protested. Subsequently the RFC brought suit in District Court to recapture subsidies paid, and the District Court entered judgment for the RFC with leave to the defendant to file suit in the Emergency Court of Appeals. The defendant filed suit in the Emergency Court of Appeals, but the case was dismissed for lack of jurisdiction with the advice given that the defendant should file a protest with the RFC, and upon denial by the RFC, refile in the Emergency Court of Appeals. The defendant proceeded to file a protest with the RFC, the RFC denied the protest, and the defendant refiled in the Emergency Court of Appeals, which then took jurisdiction of the case. This is rather involved procedure, but it is quite clear that the two cases cited by appellant are not authority for appellant's position that the District Court should have rendered judgment in favor of the Government in this case with leave to appellee to file in the Emergency Court of Appeals. In the Silver Pine Oil case, *supra*, and in the Service Pipe Line case, *supra*, it was proper for the District Court to enter judgment in favor of the RFC as the actions were based on orders of the RFC which had never been protested. There was nothing more for the administrative agency to do, therefore the court could enter judgments based on the final RFC orders.

In our case, appellee has protested to the RFC and there never has been any administrative action on the protest as required by Section 203(a) of the Act. Judgment could not be rendered in favor of the Government with leave given to appellee to file suit in the Emergency Court of Appeals because appellee has filed a protest with the RFC and the RFC has not disposed of the protest.

D. The District Court Properly Directed a Verdict for Appellee and Entered Judgment Thereon.

With the record in the state in which it is, the District Court was obliged to direct a verdict in favor of appellee and to enter judgment thereon. The appellant was unable to prove that the RFC had ever mailed a letter to the appellee, denying appellee's protest of December 15, 1950. Appellee denied ever having received a letter from the RFC denying appellee's protest. This left the protest still before the RFC, and left the appellant without a cause of action. The claim of the RFC was simply not enforceable in the District Court, and therefore the directed verdict in favor of appellee and judgment thereon was proper.

CONCLUSION

This case, for all the wealth of authorities, statutes, regulations, orders, directives, etc., thrown at the court by the Government, is a very simple case.

Under the facts shown by the record the RFC has never effectively disposed of appellee's protest. It is still before the RFC. In such a case the Government does not have a cause of action to enforce collection of a debt in the District Court. The judgment of the District Court should be affirmed.

Respectfully submitted,

MAGUIRE, SHIELDS, MORRISON & BAILEY,

WALTER J. COSGRAVE,

H. KENT HOLMAN,

Attorneys for Appellee.

APPENDIX

Section 2 (50 U.S.C. App. 902):

“ * * *

(e) Whenever the Administrator determines that the maximum necessary production of any commodity is not being obtained or may not be obtained during the ensuing year, he may, on behalf of the United States, without regard to the provisions of law requiring competitive bidding, buy or sell at public or private sale, or store or use, such commodity in such quantities and in such manner and upon such terms and conditions as he determines to be necessary to obtain the maximum necessary production thereof or otherwise to supply the demand therefor, or make subsidy payments to domestic producers of such commodity in such amounts in such manner and upon such terms and conditions as he determines to be necessary to obtain the maximum necessary production thereof: PROVIDED, That in the case of any commodity which has heretofore or may hereafter be defined as a strategic or critical material by the President pursuant to section 5d of the Reconstruction Finance Corporation Act, as amended, such determinations shall be made by the Federal Loan Administrator with the approval of the President, and, notwithstanding any other provision of this Act or of any existing law, such commodity may be bought or sold, or stored or used, and such subsidy payments to domestic producers thereof may be paid, only by cor-

porations created or organized pursuant to such section 5d; * * * ”

Section 203(a) of the Emergency Price Control Act of 1942, (56 Stat. 31) (58 Stat. 638) (50 U.S.C. App. 923) is as follows:

“At any time after the issuance of any regulation or order under section 2, or in the case of a price schedule, at any time after the effective date thereof specified in section 206, any person subject to any provision of such regulation, order, or price schedule may, in accordance with regulations to be prescribed by the Administrator, file a protest specifically setting forth objections to any such provision and affidavits or other written evidence in support of such objections. Statements in support of any such regulation, order, or price schedule may be received and incorporated in the Transcript of the proceedings at such times and in accordance with such regulations as may be prescribed by the Administrator. Within a reasonable time after the filing of any protest under this subsection, but in no event more than thirty days after such filing, the Administrator shall either grant or deny such protest in whole or in part, notice such protest for hearing, or provide an opportunity to present further evidence in connection therewith. In the event that the Administrator denies any such protest in whole or in part, he shall inform the protestant of the grounds upon which such decision is based, and

of any economic data and other facts of which the Administrator has taken official notice.”

Section 204(a) of the Emergency Price Control Act of 1942, (50 U.S.C. App. 924(a)), is as follows:

“Any person who is aggrieved by the denial or partial denial of his protest may, within thirty days after such denial, file a complaint with the Emergency Court of Appeals, created pursuant to subsection (c) of this section, specifying his objections and praying that the regulation, order, or price schedule protested be enjoined or set aside in whole or in part. * * *

No. 15505

In the United States Court of Appeals
for the Ninth Circuit

UNITED STATES OF AMERICA, APPELLANT

v.

FRANK L. SMITH, APPELLEE

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF OREGON

REPLY BRIEF FOR THE UNITED STATES

GEORGE COCHRAN DOUB,
Assistant Attorney General,

C. E. LUCKEY,
United States Attorney,

SAMUEL D. SLADE,

B. JENKINS MIDDLETON,
Attorneys,

Department of Justice, Washington 25, D. C.

FILED

DEC 5 1957

PAUL P. O'BRIEN, CLERK

**In the United States Court of Appeals
for the Ninth Circuit**

No. 15505

UNITED STATES OF AMERICA, APPELLANT

v.

FRANK L. SMITH, APPELLEE

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF OREGON

REPLY BRIEF FOR THE UNITED STATES

In his brief, appellee makes no effort to answer our fundamental contention in this case: that the judgment of the court below, entered upon a directed verdict for appellee, was in excess of the court's jurisdiction. In our main brief, we demonstrated that no court other than the Emergency Court of Appeals has jurisdiction to take any action which would adversely affect the validity of the RFC order invalidating the subsidy payments made to appellee, or which would prevent or impede the enforcement of the debt created by that order (Main Brief, pp. 8-11). We further demonstrated that the judgment of the court below had precisely this prohibited effect (*id.* at 11-13).

Appellee has addressed himself to neither of these contentions. Instead, the bulk of his argument is devoted to showing that as a matter of law RFC has as yet taken no final action upon his protest of the order of invalidation, and that until such action has been taken he has no right to appeal to the Emergency Court of Appeals (Brief for Appellee, pp. 7-11). We of course have conceded that such is the case (Main Brief, pp. 8, 12). Indeed, these circumstances form the basis for our request that this Court reverse the judgment to the court below and order the entry of judgment for the United States, with a direction "to stay execution of this judgment, *pending such reconsideration as the General Services Administration, successor to RFC in this matter, may deem it necessary to give to appellee's protest before making a final and effective disposition thereof*; and pending such efforts to seek review in the Emergency Court of Appeals as may prove necessary or as appellee may deem advisable" (Main Brief, p. 18; emphasis added).

Appellee argues that the district court could not follow this course, and seeks to document his contention by attempting to distinguish the facts of this case from those in two cases relied upon in our main brief, *Silver Pine Oil Company v. Reconstruction Finance Corporation*, 205 F. 2d 835 (Em. Ct. App.), and *Reconstruction Finance Corporation v. Service Pipe Line Co.*, 198 F. 2d 775 (C. A. 10) (Brief for Appellee, pp. 11-13). Appellee points out that in those cases, unlike this one, the defendants had never protested the orders upon which suit was brought. Therefore, he says, in those cases "it was proper for

the District Court to enter judgment in favor of the RFC * * *. There was nothing more for the administrative agency to do, therefore the court could enter judgments based on the final RFC orders” (Brief for Appellee, p. 12).

This attempted distinction is without substance, for in both the *Silver Pine* and *Service Pipe Line* cases there *was* something “more for the administrative agency to do” following the entry of judgments for the United States and the granting of stays of execution—despite the failure of the defendants to file protests prior to the judicial proceedings. As we pointed out in our main brief (pp. 14–16), the stays in those cases were granted by the district courts to permit the agency to receive and dispose of protests to be filed by the defendants. Consequently, the only distinction between those cases and this is that in the present case there is *less* for the agency to do, since the protest has already been received and considered. Unless the agency wishes to reconsider appellee’s protest on its merits, it need do no more than issue a second order of denial, reiterating the terms of the first such order which was of no effect due to apparent nondelivery. In these circumstances, we fail to see the logic of appellee’s argument that, whereas in *Silver Pine* and *Service Pipe Line* it was proper for the courts to enter judgment for the United States and then to stay execution pending the filing of a protest, administrative disposition of the protest, and a possible appeal to the Emergency Court, it would be improper to follow the same course here merely because the protest has already been filed but not finally disposed of.

CONCLUSION

For the foregoing reasons, as well as for the reasons set forth in our main brief, we respectfully submit that the relief requested at page 18 of our main brief should be granted.

GEORGE COCHRAN DOUB,
Assistant Attorney General,

C. E. LUCKEY,
United States Attorney.

SAMUEL D. SLADE,
B. JENKINS MIDDLETON,
Attorneys,

Department of Justice, Washington 25, D. C.

DECEMBER 1957.

No. 15505

United States
Court of Appeals
for the Ninth Circuit

UNITED STATES OF AMERICA,

Appellant,

vs.

FRANK L. SMITH,

Appellee.

Transcript of Record

Appeal from the United States District Court for the
District of Oregon

FILED

JUN 17 1957

No. 15505

United States
Court of Appeals
for the Ninth Circuit

UNITED STATES OF AMERICA,

Appellant,

vs.

FRANK L. SMITH,

Appellee.

Transcript of Record

Appeal from the United States District Court for the
District of Oregon

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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H. KENT HOLMAN,
723 Pittock Block,

Portland 5, Oregon,
For Appellee.

In the United States District Court for the
District of Oregon

Civil No. 8456

UNITED STATES OF AMERICA,

Plaintiff,

vs.

FRANK L. SMITH,

Defendant.

COMPLAINT

Comes now the United States of America, by C. E. Luckey, United States Attorney for the District of Oregon, and Thomas B. Brand, Assistant United States Attorney, acting under direction of the Attorney General of the United States, and for cause of action against the above-named defendant complains and alleges:

I.

That this is a Civil action brought by the United States of America pursuant to Section 1345 of Title 28, U. S. C.

II.

That the defendant, Frank L. Smith, is a resident of the State and District of Oregon.

III.

That pursuant to the first proviso of Section 2 (e) of the Emergency Price Control Act of 1942, as amended (50 U. S. C. App. 902 (e)), Defense Supplies Corporation and its successor, Reconstruction

Finance Corporation, conducted, at the times herein mentioned, a meat subsidy program under which certain subsidy payments were made to qualified livestock slaughterers. The basic regulations which established the terms and conditions under which such subsidy payments were to be made during the periods involved in this complaint are Reconstruction Finance Corporation's Livestock Slaughter Payments Regulation No. 3 (8 F. R. 10826), effective June 7, 1943, Revised Regulation No. 3 (10 F. R. 4241), as amended, effective January 19, 1945, and Office of Economic Stabilization Directive 41 (10 F. R. 4494), as amended, effective April 24, 1945.

IV.

That as an incident of the meat subsidy program, on June 25, 1951, the Reconstruction Finance Corporation issued its denial from the Debtor's protest, a certified copy of which is annexed hereto as Exhibit "A," invalidating defendant's subsidy claims in the total amount of \$29,244.74 which were paid upon preliminary approval only.

V.

That Section 7 (b) (2) of Directive 41 of the Office of Economic Stabilization and amended by Amendment No. 2 effective January 28, 1946, (11 F. R. 1215, 32 C. F. R. (1946 Supp.) p. 5069) provided that subsidies shall be withheld upon the certification of the Office of Price Administration that it was determined in a court of first instance or by a hearing commissioner, that the slaughterer had violated a price regulation. Upon receipt of such certifi-

cation, and in accordance with the implementing Section 7003.10 (a) (2) of Revised Regulation No. 3 as amended by Amendment No. 15, Reconstruction Finance Corporation invalidated the claims for the reporting periods covered by the certification, June, July, and August, 1945, which had previously been paid upon preliminary approval only in the amount of \$37,839.67 and required restitution thereof. By set-off, \$9,528.59 was credited to the debtor's account reducing the principal amount of his indebtedness to the plaintiff to \$29,244.74.

VI.

That the plaintiff has made repeated demands upon the defendant for the payment of the claims justly due and owing the plaintiff in the sum of \$29,244.74, together with interest from the dates of payment at the rate of 4 per cent per annum. Defendant refused and continues to refuse to pay said debt.

Wherefore, the plaintiff demands judgement in the sum of \$29,244.74 and interest from the dates of payment to the date of judgement at the rate of 4 per cent per annum, together with interest and costs of suit.

C. E. LUCKEY,

United States Attorney for
the District of Oregon;

/s/ THOMAS B. BRAND,

Assistant United States
Attorney.

EXHIBIT A

Reconstruction Finance Corporation
Washington

Certificate

Pursuant to the provisions of Section 1733 (b), Chapter 115, Title 28 of the United States Code, as amended,

I, M. W. Knarr, Assistant Secretary of Reconstruction Finance Corporation, a corporation created and existing pursuant to the Reconstruction Finance Corporation Act, approved January 22, 1932 (47 Stat. 5), as amended [successor to Defense Supplies Corporation, pursuant to Joint Resolution approved June 30, 1945 (59 Stat. 310)] do hereby certify that the annexed photostatic page is a true and correct copy of a file copy of a letter dated June 25, 1951, from Leo Nielson, Secretary, to Mr. Frank L. Smith, 8349 North Vancouver Avenue, Portland, Oregon, Re: Meat Subsidy LS-1855-M, on file in the Washington Office of Reconstruction Finance Corporation; and in my custody as part of the official records of Reconstruction Finance Corporation.

In Witness Whereof, I have hereunto set my hand and caused the seal of Reconstruction Finance Corporation to be affixed at Washington, D. C., on this 26th day of April, 1954.

[Seal] /s/ M. W. KNARR,
Assistant Secretary Reconstruction Finance Corporation.

cc: Mr. Carroll
Mr. Rutland
Mr. Horwitz
Mr. Crandall
Mr. Ronan
Mr. Bynum
Mr. Hersh
Mr. Brown
Mr. Wise
Mr. Doherty
Mr. George Fruit, Dept. of Justice.

June 25, 1951

Mr. Frank L. Smith
8349 North Vancouver Avenue
Portland, Oregon

Re: Meat Subsidy
LS-1855-M

Dear Mr. Smith:

This is with further reference to your telegram of December 15, 1950, which was filed as a protest under Regulation No. 11 of RFC. Your protest requests a review of your claims for May, June, July and August, 1945, aggregating \$37,839.67, and for June, 1946, in the amount of \$13,815.22.

The OPA certified to RFC that, in a Hearing Commissioner's Proceeding, it was determined that you had violated Control Order No. 1 by slaughtering in excess of your quotas during the months of

June, July and August, 1945. Upon receipt of this certification, RFC was required, under the provisions of Section 7 (b) (2) of Directive 41 of the Office of Economic Stabilization, to invalidate your claims for the months of June, July and August, 1945. The directive was mandatory and does not permit this agency to exercise any discretion in its application. Consequently, it is our determination that your June, July and August, 1945, claims, aggregating \$37,839.67, were properly invalidated. Your protest indicates that the payment made on your May, 1945, claim was also charged back to your account. The OPA certification invalidated your claims only for the months of June, July and August, 1945, in the amount of \$37,839.67. Your May, 1945, claim was processed and paid in accordance with the provisions of the meat subsidy regulation.

Your June, 1946, cattle claim, which called for a net payment of \$9,528.59, was paid by application to our claim against you. You were notified of this action on August 13, 1948. The balance of \$29,244.74 due on our claim against you has been referred to the Department of Justice for collection.

This should be considered a formal and final denial of your protest from which appeal lies only to a court having jurisdiction over such matters.

Very truly yours,

/s/ LEO NIELSON,
Secretary.

[Endorsed]: Filed February 2, 1956.

[Title of District Court and Cause.]

ANSWER

Comes now the defendant and for answer to plaintiff's complaint herein denies each and every allegation, thing and matter in said complaint contained and the whole thereof, except defendant admits that he is a resident of the State and District of Oregon.

Wherefore, having fully answered, defendant prays that plaintiff take nothing by its complaint.

/s/ RALPH R. BAILEY,
Attorney for Defendant.

Service of copy acknowledged.

[Endorsed]: Filed March 15, 1956

[Title of District Court and Cause.]

PLAINTIFF'S REQUEST FOR ADMISSION
OF FACTS AND AUTHENTICITY OF
DOCUMENTS

Comes now the plaintiff, appearing by and through C. E. Luckey, United States Attorney for the District of Oregon, and Thomas B. Brand, Assistant United States Attorney, and pursuant to the provisions of Rules 36 and 37 (c) of the Federal Rules of Civil Procedure, hereby requests admission

by the defendant of the following facts, within 10 days after service upon it of this request:

1. That Frank L. Smith, during the Years 1945 and 1946, was a slaughterer of livestock doing business in and around the State and District of Oregon.

2. That during the Years 1945 and 1946, Frank L. Smith received subsidy payments from the United States, acting by and through the Office of Defense Supplies and the Reconstruction Finance Corporation, pursuant to the Emergency Price Control Act of 1942, the Reconstruction Finance Corporation Livestock Slaughtering Payments Regulation No. 3, as amended, and the Office of Economic Stabilization Directive No. 41, as amended.

3. That on or about May 27, 1946, a certain hearing was held by the Office of Price Administration, in which it was alleged that Frank L. Smith had violated control Order No. 1 by slaughtering in excess of his quota during the Months of May, June, July and August of 1945.

4. That the Commissioner, at the said hearing, concluded that Frank L. Smith had violated the said Control Order No. 1 by slaughtering in excess of his quota during the Months of June, July and August of 1945.

5. That a claim receivable was prepared by certain agencies of the United States, stating that as a result of such finding, the sum of \$37,839.67 was due and owing the United States from the said Frank L. Smith.

6. That a copy of the said claim receivable was received by Frank L. Smith.

7. That on or about December 15, 1950, the said Frank L. Smith protested, pursuant to Regulation No. 11 of the Reconstruction Finance Corporation, against the finding of the Office of Price Administration Hearing Commissioner and the claim receivable alleged against him by the United States.

8. That the United States denied the protest and advised Frank L. Smith, by letter dated June 25, 1951, a copy of which has been furnished defendant as Exhibit A attached to the complaint herein, that an appeal could be had only by court action, in a court having jurisdiction over such matters.

9. That Frank L. Smith received the said Exhibit A and that the copy attached to the complaint herein is genuine.

10. That the said Frank L. Smith did not, after receipt of the letter dated June 25, 1951, make any further protest to the Office of Defense Supplies, to Reconstruction Finance Corporation, or to any other federal agency.

11. That the said Frank L. Smith did not, after receipt of the said letter dated June 25, 1951, nor has he ever since that time, appealed the decision to any court of the United States.

12. That no payment to the United States or to any of its agencies has ever been made by Frank L.

Smith on account of the said claim set forth in the letter of June 25, 1951.

C. E. LUCKEY,
United States Attorney,
District of Oregon;

/s/ THOMAS B. BRAND,
Assistant United States
Attorney.

Affidavit of service by mail attached.

[Endorsed]: Filed March 26, 1956.

[Title of District Court and Cause.]

ANSWER TO PLAINTIFF'S REQUEST FOR
ADMISSION OF FACTS AND AUTHEN-
TICITY OF DOCUMENTS

Comes now defendant and for answer to plaintiff's request for admission of facts and authenticity of documents, replies as follows:

1. Admits statement No. 1.
2. Admits statement No. 2.
3. Admits statement No. 3.
4. Denies statement No. 4.
5. Defendant has no knowledge at this time upon which to deny or affirm statement No. 5.
6. Denies statement No. 6.
7. Admits that defendant protested at all times any indebtedness to the United States.

[Title of District Court and Cause.]

VERDICT

We, the Jury duly empaneled and sworn to try the above-entitled cause, under the direction of the Court, do find our verdict in favor of the defendant and against the plaintiff.

September 20, 1956.

/s/ MONTIE BRICKELL,
Foreman.

[Endorsed]: Filed September 20, 1956.

[Title of District Court and Cause.]

MOTION TO SET ASIDE VERDICT AND FOR
JUDGMENT FOR PLAINTIFF

Comes now the plaintiff, United States of America, by C. E. Luckey, United States Attorney for the District of Oregon, and Thomas B. Brand, Assistant United States Attorney, and pursuant to the provisions of Rule 50 of the Federal Rules of Civil Procedure, respectfully moves the Court for an order setting aside the verdict heretofore rendered and for judgement in favor of plaintiff, in accordance with the plaintiff's motion for a directed verdict.

In support hereof, plaintiff refers the Court to the pleadings, including plaintiff's requests for

admissions and defendant's responses thereto, the testimony of Frank L. Smith, the exhibits introduced by plaintiff on trial, and the attached memorandum of points and authorities.

Dated this 26th day of September, 1956.

C. E. LUCKEY,
United States Attorney,
District of Oregon.

/s/ THOMAS B. BRAND,
Assistant United States Attorney, of Attorneys for
Plaintiff.

Affidavit of service by mail attached.

[Endorsed]: Filed September 26, 1956.

In the United States District Court
for the District of Oregon

Civil No. 8456

UNITED STATES OF AMERICA,
Plaintiff,

vs.

FRANK L. SMITH,
Defendant.

JUDGMENT

This cause having come on regularly for trial on the 21st day of September, 1956, before the under-

signed Judge of the above-entitled court, plaintiff appearing by Mr. Thomas B. Brand, Assistant United States Attorney, defendant appearing in person and by Mr. Walter J. Cosgrave and Mr. H. Kent Holman, his attorneys; a jury having been duly empaneled and sworn and having heard the opening statements of counsel and the evidence adduced on behalf of the parties, and both parties having rested, and the defendant having moved the court for a directed verdict in his favor and it appearing to the court that said motion should be allowed; the court thereafter directed the jury to return its verdict in favor of the defendant and against the plaintiff, which verdict was returned by the jury in favor of the defendant and against the plaintiff, was received by the court and entered of record, said verdict being in words and figures as follows:

“We, the Jury duly empaneled and sworn to try the above-entitled cause, under the direction of the Court, do find our verdict in favor of the defendant and against the plaintiff.

“September 20th, 1956.

“MONTIE BRICKELL,
“Foreman.”

Now, Therefore, based upon said verdict, it is

Considered, Ordered and Adjudged that plaintiff take nothing and that judgment be entered against plaintiff and in favor of defendant.

Dated this 20th day of September, 1956.

/s/ WILLIAM G. EAST,
Judge.

[Endorsed]: Filed September 28, 1956.

[Title of District Court and Cause.]

MOTION

Comes now the plaintiff, United States of America, by C. E. Luckey, United States Attorney for the District of Oregon, and Thomas B. Brand, Assistant United States Attorney, and pursuant to the provisions of Rules 50 and 59, Federal Rules of Civil Procedure, and as an alternative to plaintiff's Motion to Set Aside Verdict and for Judgment for Plaintiff previously filed in this court and cause, respectfully moves the court for an order for a new trial.

Dated: October 1, 1956.

C. E. LUCKEY,
United States Attorney,
District of Oregon,

/s/ THOMAS B. BRAND,
Assistant United States Attorney, of Attorneys for
Plaintiff.

Affidavit of Service by Mail attached.

[Endorsed]: Filed October 1, 1956.

[Title of District Court and Cause.]

ORDER

This matter having come on to be heard on plaintiff's motion for an order to set aside the verdict heretofore entered, and for a judgment in favor of the plaintiff, notwithstanding the verdict, and in the alternative for a new trial, and the Court being fully advised and it appearing to the Court that said motion should be denied,

Now, Therefore, the motions of plaintiff for judgment notwithstanding the verdict and for a new trial be and the same hereby are denied.

Dated this 5th day of November, 1956.

/s/ WILLIAM G. EAST,
Judge.

Service of Copy acknowledged.

[Endorsed]: Filed November 5, 1956.

[Title of District Court and Cause.]

NOTICE OF APPEAL

To: Frank L. Smith, Defendant, and Maguire, Shields, Morrison & Bailey and Walter J. Cosgrave and H. Kent Holman, Attorneys for Defendant:

Notice is hereby given that the United States of America, plaintiff above named, hereby appeals to

the United States Court of Appeals for the Ninth Circuit from the Judgment entered in this action on the 28th day of September, 1956, in favor of the defendant and against the plaintiff and from that Order entered November 5, 1956, herein denying plaintiff's motions for judgment notwithstanding the verdict, and for an order setting aside the verdict and for judgment for plaintiff, and for a new trial.

C. E. LUCKEY,
United States Attorney,
for the District of Oregon,

/s/ THOMAS B. BRAND,
Assistant United States Attorney, of Attorneys for
Plaintiff.

[Endorsed]: Filed January 2, 1957.

United States District Court,
District of Oregon
Civil No. 8456

UNITED STATES OF AMERICA,
Plaintiff,

vs.

FRANK L. SMITH,
Defendant.

TRANSCRIPT OF PROCEEDINGS

Before: Honorable William G. East,
U. S. District Judge.

September 20, 1956—10:00 A.M.

Appearances:

TOM B. BRAND,
Attorney for Plaintiff.

WALTER COSGRAVE,
Attorney for Defendant.

The Court: The Government's opening statement.

Mr. Brand: If the Court please, Ladies and Gentlemen. I stand before you in some fear and apprehension in connection with this matter. You all indicated that during the war and after the war in connection with your relationships with the various Governmental agencies for handling price control and price regulations, that your connections were not such that you had any feeling of prejudice or animosity against the Government. I was in school, high school at the time, and in the service shortly thereafter, and at college immediately after I served, so I had no real connection at all with the O.P.A. or the O.P.S. either, and yet I remember a distinct feeling of animosity and prejudice toward the Governmental agencies.

They seemed to be bureaucratic, they seemed to be ignorant, and they seemed to be very foolish. And I am now in the position of standing before you and attempting to defend one of those Governmental agencies in connection with a matter which happened about ten years ago.

I think for the most part the price-control regulations worked reasonably well. Prices were held in line fairly well during the war, and I am told that the situation during the second World War was very much better than it was during the first. In any case, I give the people that were working on the boards credit for thinking they were [2*] right. And now, looking back then, just as I have tried to disabuse my feeling toward the Government bureaucrats, and I am myself one, I am sure you will do the same. The situation briefly is this. Mr. Smith was in the business of packing and slaughtering cattle. During the two years in which we are particularly interested, 1945 and '46, he had been in business for some time. Now, when the war developed and it appeared that it was going to be necessary to put control on prices, the Government had to make some arrangements for keeping middlemen going, and in the meat business the procedure was this: Prices were controlled, as you will recall, more or less controlled at least, for the retail prices of meat. However, the cattlemen themselves did not have a specific price ceiling upon heads of cattle. Therefore, in order to keep the middlemen, the distributor in business, the Government worked out a plan whereby the middleman or supplier could keep going to prevent him from being squeezed out by rising prices in cattle and stable prices in meat, and since speed was obviously necessary in order to keep the meat packers going, the meat packers, Smith,

*Page numbering appearing at top of page of original Reporter's Transcript of Record.

claimed for each month showing how many head of cattle were slaughtered, and the type of cattle, the grade, and what have you.

There were probably literally thousands of forms filled out by just one slaughterer, if he did anything [3] extensive, and you can imagine all the slaughterers in this area handing the A.P.O.—or, the O.P.A. their forms. Regulation provided that the Government would pay those subsidies upon the claims made by the slaughterer immediately, and in the normal course of business when the slaughterer had met his quota for a period, he would usually get his pay some time in June or July.

This procedure, at least, kept the meat going to the retail stores so it could be purchased. Naturally, the Government had to work out some kind of an arrangement whereby they could protect themselves, and so the regulations provided that while money was paid practically immediately, nevertheless the Government could come back at subsequent times to check these records over and make sure that they were arithmetically correct, and all the multitudinous records were kept at the meat slaughterers, and also provided that in the event that there was a violation of some price regulations or any of the other regulations set up during the war for the purpose of controlling prices or controlling products or what have you, then under those circumstances a subsidy payment could be declared invalid; if it was declared invalid, then the Government acting through the Reconstruction Finance Corporation could make a demand upon the slaughterer saying

in effect, you either did not keep your records properly or you were charged with violating [4] some regulation or other, and you owe us so much money.

Now, in the case of Mr. Smith, it will appear that Mr. Smith in a hearing before an O.P.A. commissioner was charged with violating an order called Control Order Number 1, and the net result of that was, it was found and determined by the hearing commissioner that he had violated that order, and the Reconstruction Finance Corporation declared that an invalid subsidy was paid to Mr. Smith for the three months of June, July, and August, 1945.

A demand was made by them upon Mr. Smith to repay that money, and there then developed various administrative appeals, and what have you, the net result being that Mr. Smith did not pay the money back to the Government, and the Government at this time is suing Mr. Smith to recover those subsidy payments.

Thank you.

Mr. Cosgrave: May it please the Court and Members of the Jury. I don't think that any of you will have any feeling against those bodies that did handle the price regulations during the war. I think that all of you will realize, I think all of you do, that it was a necessary job, sometimes a very distasteful job. At times there might have been rather unreasonable regulations pertaining to meat or other articles, but as they used to say during the war, it

was just one of the things we had to put up [5] with. So, I would ask that you have no feeling against those boards at all. But, here is a case where the Government is coming in and trying to get back some money which, as Mr. Brand says, was paid to him so that there could be meat on the shelves in the butcher shops. That's what it amounts to. The price of meat was fixed. You couldn't raise it, it was an offense to sell meat at over that price, and yet the cattlemen wouldn't sell their beef to the slaughterer at the price that the slaughterer could pay, so the Government said, well, instead of raising the price of meat, we will pay subsidies, and I think you will find that there was no real—no violation here by Mr. Smith. They had certain quotas, as you and I all know, and you will find that he has stuck closely to those quotas that he had, and that he was told in this one month, June, that's involved here, that he could kill 20 per cent more than the quota in that month, and that's what he did kill, 20 per cent more. And I think the file of the office of Price Administration approved that and said just send in your figures and we will—we are approving it for these three months, June, July, and August, the three months involved here.

Now, during the maze of directives and boards and such, I think you will find that there were something like—with respect to this, 1,454 directories and they came from 19 different Governmental agencies. And later on, [6] after this took place and the meat was plentiful, they said to Mr. Smith, you are not entitled to that extra 20 per cent. Techni-

cally, according to the law, you went over your quota and you're just stuck for that amount, the difference between what you paid the cattle raiser for your beef and what you could sell it for, and there is a technicality why you can't keep that money. We have got to have that money back.

Well, I think what we will bring before you here is that the Government says that they sent Mr. Smith a notice that he owed that money and that he didn't proceed as he should, and that thereafter, now, he just owes the money and that he can't have a hearing on these other matters. Well, I think you will find that there is no violation here. If you look at this thing, I think you will find that the Government didn't comply with these strict regulations themselves which they are insisting that Mr. Smith comply with, and I think you will find there is no right here for the Government to recover this amount from Mr. Smith. You understand that this happened—this isn't a claim for any offense that Mr. Smith was guilty of. The Government claims that well, according to District Rules, this mistake was made back there and we feel, although we approved it, that that wasn't quite the regulation.

Now, we have got to take all that into account [7] and I think you will find that there was an actual directive stating what he had done and telling him just to send in the data with respect to that. I think you will find that there was no ground here on which the Government should be allowed to recover this large amount from Mr. Smith.

Thank you.

The Court: The Government's first witness?

Mr. Brand: The Government will call Mr. Frank L. Smith. [8]

FRANK L. SMITH

the defendant herein, was called in behalf of the plaintiff as an adverse witness and, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Brand:

Q. Mr. Smith, were you during the years 1945 and '46—your Honor?

The Court: You may approach the witness.

Q. (By Mr. Brand): I mumble, Mr. Smith, so if you don't hear the questions, you just speak up. O.K.? In 1945 and 1946 were you a meat slaughterer doing business in Portland, Oregon? A. Yes.

Q. Did you, during that period, receive meat subsidies from the United States Government?

A. Did I get—

Q. Did you get the meat subsidies—did you get money from the Government for meat?

A. We got subsidy money as we called it, yes.

Q. All right, fine. Was there ever a hearing, Mr. Smith, in March of 1946, at which you were accused of violating the price regulation—

A. How was that?

Q. Were you accused of violating a price regulation in 1946; was there a hearing? [9]

A. Yes, I think so.

Q. Do you remember what the outcome of that

(Testimony of Frank L. Smith.)

hearing was, Mr. Smith? A. Nothing.

Q. Was there any determination made; did anybody ever tell you that you had violated the price regulations?

A. The only thing they done was they didn't give me my subsidies, that's about all.

Q. Did you after that hearing get a letter or an order from Reconstruction Finance Corporation saying that you owed them twenty-nine-some thousands dollars because you violated the price regulations?

A. No.

Q. Has the Government ever made a claim against you for about \$37,000? A. No, sir.

Q. They never have? A. No.

Mr. Brand: I ask that this sheaf of documents be marked for identification Plaintiff's Exhibit 2 from the pretrial order.

(Documents referred to were marked Plaintiff's Exhibit 2 for identification.)

Mr. Cosgrave: Mr. Brand, there is no question about any of these, we will stipulate that—I mean, anything [10] you want with respect to those.

Mr. Brand: Are you stipulating that Frank L. Smith sent the wire dated December 15, 1950, to Leo Neilson?

Mr. Cosgrave: Yes, it was sent by his attorney, I think. Yes, it was taken from our office. There is no question about it.

Mr. Brand: And also did Mr. Smith also prepare an affidavit or sign an affidavit dated Decem-

(Testimony of Frank L. Smith.)

ber 23, 1946, the first paragraph of which says: "It was determined by the opinion and order of Hearing Commissioner Milton Koss, entered on 27 May, 1946, a copy which is attached, that your petitioner had violated the provisions of Section 10 (a) of Control Order 1 with respect to the——"

Mr. Cosgrave: We made photostatic copies of that; we have no objection.

The Court: Well, let's have them marked.

Mr. Brand: The plaintiff offers Exhibit 2.

The Court: I take it there is no objection?

Mr. Cosgrave: No objection, your Honor.

The Court: They will be received. Either counsel may read any portion of the documents to the jury at any time.

Mr. Cosgrave: Very well, your Honor.

(Whereupon, documents previously marked Plaintiff's Exhibit 2 for identification were received in evidence.) [11]

Mr. Brand: I ask that this document be marked Plaintiff's Exhibit 1 for identification.

(Whereupon, document referred to was marked Plaintiff's Exhibit 1 for identification.)

(Document handed to witness.)

Q. (By Mr. Brand): Mr. Smith, I hand you—or, the Clerk handed you Plaintiff's Exhibit 1. Will you examine that letter, please, and tell me if you have ever seen it before? A. Which is——

(Testimony of Frank L. Smith.)

Mr. Cosgrave: Well, if the Court please, that's the letter that has already been inquired about, and the man said he didn't receive it.

Mr. Brand: This is a letter dated June 25, 1951, a copy of which is attached to the Complaint. I have asked no questions about it previously. I didn't mean to, I apologize.

Mr. Cosgrave: I think you did.

The Witness: No.

Q. (By Mr. Brand): Do I understand, Mr. Smith, you have never seen that letter before?

A. No. No; what year is this?

Q. June 25, 1951? A. No.

Q. You never got that letter? [12]

A. I don't know nothing about it. Every single thing that I got was sent to Mr. Bailey's office, any mail of this kind was mailed right to him.

The Court: Did the jury hear the answer?

Mr. Holman: Repeat it, please.

The Witness: It went to Mr. Bailey's office. Everything was sent right to him, anything that had anything to do in regard to that was sent to him.

Q. (By Mr. Brand): Mr. Bailey from the firm of Maguire, Shields, Morrison & Bailey?

A. Yes, that's right.

Q. And that is the firm that is representing you by Mr. Cosgrave and Mr. Holman?

A. Yes, same firm.

Q. In October of 1951, Mr. Smith, did you get a letter from the United States Attorney for Oregon,

(Testimony of Frank L. Smith.)

in which the statement was made that you owed the Government about \$29,000; do you remember receiving that letter? A. No, sir.

Q. When was the first time that it came to your attention that the Government denied your protest of your December, 1950, telegram, a copy of which I showed you previously; when did you first find that out that that was denied?

A. Well, when first I found out that they didn't allow it, that was the first we found out; now, whatever the date [13] was, '44, whatever day it was when they didn't give it to me, that's the first I found out.

Q. No, I mean in 1950 you sent a wire——

A. I don't know.

Q. I showed you a copy of the wire.

A. I don't know; as I said, everything was sent to Ralph Bailey; he was taking care of it.

Q. You don't know to your own memory if you ever received that letter or not? A. No.

Mr. Cosgrave: Well, if the Court please, he has already been questioned on that.

The Court: Yes, he said he did not receive it.

Mr. Brand: O.K. I would like to offer at this time Exhibit 1 in evidence, it's already attached to the Complaint.

Mr. Cosgrave: We would object, your Honor, to the offer of that, there is no competency or relevancy here.

Mr. Brand: I will withdraw the offer for the time being.

(Testimony of Frank L. Smith.)

The Court: Very well.

Q. (By Mr. Brand): Mr. Smith, were you served with a copy of the Complaint in this matter on February 2nd of this year? Did you get a copy of the Complaint telling you to come into Court and defend this action in February of this year?

A. No. [14]

Q. I think the original file will show—

Mr. Cosgrave: We will stipulate that it was served by the Marshal's office; it was given to us.

Mr. Brand: Are you also stipulating that there was—a copy of the 1951 letter was attached to the Complaint?

Mr. Cosgrave: It was attached to the Complaint; there is no question about it.

Q. (By Mr. Brand): One more question, Mr. Smith. In the month or so after the Complaint was served upon you here, did you file any document in the Emergency Court of Appeals for the United States? A. Did I file?

Q. Yes.

A. No, I don't know what the attorneys did. Do you know? I don't know.

Mr. Cosgrave: The answer to that is no, Mr. Brand.

Mr. Brand: Your counsel has already answered the question, thank you.

The Witness: What?

Mr. Brand: Your attorneys have already informed me that you did not file a Complaint this year in the Court of Appeals.

(Testimony of Frank L. Smith.)

The Witness: This year?

Mr. Brand: Yes.

The Witness: I didn't file anything in this year, no.

Mr. Brand: No more questions, your Honor. [15]

The Court: Cross-examination?

Mr. Cosgrave: No questions, your Honor.

The Court: You may be excused.

(Witness excused.)

Mr. Brand: At this time, if the Court please, the plaintiff moves for a directed verdict on the ground that the defendant has not complied with the provisions of Emergency Price Control Act, Title 50, Section 924, providing that any plaintiff who receives a denial or partial denial of his protest may within 30 days after such denial file an appeal with the Emergency Court of Appeals. It appears that he has not done so on this case as regards any administrative or court appeal, and the regulations in this case are not subject to the question of this Court, and the United States is entitled to judgment.

The Court: The motion will be overruled at this stage.

Mr. Brand: Well, United States will stand upon the motion, your Honor.

The Court: Very well.

Mr. Brand: I am finished. The United States rests.

The Court: Very well.

Mr. Cosgrave: If we might have just a short recess, your Honor?

The Court: Very well.

(A short recess.) [16]

Mr. Cosgrave: May it please the Court, the defendant Frank L. Smith at this time, plaintiff having rested, moves for a directed verdict in his favor.

The Court: I wonder, Mr. Cosgrave, if we could hold that in abeyance for just a moment. I am going to look through these requests or admissions of fact.

Mr. Cosgrave: I am sorry.

The Court: By reason of the fact that we don't have a pre-trial order, I am just about to submit the matter on the pleadings as they stand.

Mr. Cosgrave: I beg your pardon?

The Court: I say inasmuch as we don't have a pretrial order, I am about to submit the matter on the pleadings.

Mr. Cosgrave: Well, your Honor, I have the defendant's contention here which might be attached to that draft.

The Court: Thank you.

Members of the Jury, I think you may take a recess. Make yourselves comfortable in the jury room.

(Whereupon, the jury was recessed.)

(The following proceedings were held out of the presence of the jury.)

The Court: Mr. Brand, I take it that there is none of the plaintiff's requests or admissions of fact

and answers thereto that you wish to read into the record?

Mr. Brand: No, your Honor, I am prepared to proceed [17] entirely upon, in effect, the stipulations of counsel.

The Court: Now, as I understand it, is it your—the defendant apparently denies throughout that he ever received the letter referred to as the letter of June 25, 1951, advising him in answer to his telegram?

Mr. Brand: He has denied receiving it, although he was provided with a copy.

The Court: Right. It's your contention that he can appeal that now?

Mr. Brand: No, your Honor, it is not. The O.P.A. provided that his opportunity to appeal in the Emergency Court of Appeals must be taken within 30 days from the denial. Now, in this case we believe we are able to assume that that means, although I am not positive, that means from the date of the receipt of the denial; that is the contention of the Government in this case; that even after he received it in February of this year, as attached to the Complaint, that he should have 30 days in which to file an appeal in the United States Court of Appeals; and not having done so, the United States is entitled to judgment. Now, on the basis and the thought that this matter would be before the Court purely as a matter of law, the United States has ordinarily made a practice of making a motion for a summary judgment in the event that

the verdict is directed in behalf of the defendant, then we will then try [18] for an order N.O.V. and proceed with the same questions of law.

The Court: All right. Mr. Cosgrave?

Mr. Cosgrave: At this time, may it please the Court, the defendant moves for a directed verdict in favor of the defendant upon the ground and for the reason that the plaintiff, as to the facts of the law, has shown no right to the relief demanded here; upon the further ground that, and specifically, that the plaintiff has failed to comply or to show a compliance with regulations under which plaintiff seeks to recover; and on the further ground that the plaintiff has failed to show a receipt of the notice by the defendant upon which the Government relies; on the ground that the defendant was denied a hearing with respect to this matter, and that the procedure which is claimed by the plaintiff to have been conclusive upon the defendant denied him due process of law in that there was no possibility of hearing whatsoever with respect to that, your Honor. Well, as a matter of fact, I think at this time there is nothing before the Court with respect to this letter except that it is in the Complaint, and perhaps that is sufficient if counsel wants to reoffer that letter.

The Court: Well, I think it was stipulated by counsel that he did receive it, but it might be just as well for you to mark that and make it a part of the record. Let's [19] do that after the jury gets back.

Mr. Cosgrave: Very well, but as I say, your

Honor, in the very statement in that letter, it shows on its face that there was no possibility of an appeal. In other words, the letter says that under the regulations, there was no right to hearing, that the decree of the Court was mandatory. In other words, there was no appeal here possible, because it was mandatory. That is the further ground, but here, your Honor, the failure in plaintiff's case, of course, is that they are relying on this notice being conclusive to the defendant. He didn't receive the notice. They are not able to prove he received the notice. They now come in, and it's a very brainy thought, I think, to come in and say, well, it referred to you when we sued you in the United States District Court for \$49,000, but of course, at that time here was an action or a suit pending in this court. I don't think that the Government can stultify its position by suing a party in the United States District Court for an amount of money and then come in on the trial of the case and say, well, you should have appealed from our Complaint to the Emergency Court of Appeals, and then you'd have been all right. If that is the Government's position, why then if it is their thinking that that could be done while this matter was pending in the United States District Court, why certainly we would want to go ahead and do it. [20] But today I think we are here on a matter of law, as far as the plaintiff's case is concerned.

I will just read to the Court, just as a matter of information, the statute on which they are relying here. As nearly as we can figure out, that provides

that within a reasonable time after the filing of any protest, but in any event not more than 30 days after such filing, the administrator should either approve or deny the protests, either by notice to the protester or hearing or provide an opportunity for presenting further evidence in connection therewith, and none of those things were ever done by the plaintiff here.

Mr. Brand: Well, the telegram shows that further evidence was submitted. The telegram that Smith sent.

The Court: I am sorry——

Mr. Brand: The telegram that Mr. Smith or his counsel sent in December, 1950, indicates a final protest and indicating that further information will be submitted at an early date. Whether it was or not, I don't know. The assumption which I go on is that the department, the R.F.C. received the letter, the telegram as they indicate in paragraph one of the letter of June 25, 1951. They indicated that the protest was denied and they state specifically that the only recourse is filing a Complaint in the Emergency Court of Appeals. Now, there is at least one case which [21] seems to suggest, and I will submit it to the Court along with my motion for judgment N.O.V. It would seem to suggest, if not the decree of the order, at least the denial of the order is the time from which the 30-day period runs. Under these circumstances, I am not prepared to argue about that.

The Court: Well, it seems to me that there is absolutely nothing here to submit to the jury, and I am somewhat concerned about the procedure. I think

that your suggestion is probably the best way to raise the legal question involved that I can think of, that we can discharge this jury by a verdict directed in favor of the defendant and then entertain your position and you can brief it up and I can take it as a matter of law. Do you have any thoughts about that?

Mr. Cosgrave: No, the only thought I had was that there was some testimony that we wanted to get in, but I guess if the matter were submitted on a verdict directed in our favor, we couldn't complain much about it. I would only wish to offer this one, I don't know whether—would you stipulate that that was received, that that was mailed? If not, we will have Mr. Smith testify to that.

Mr. Brand: We would object on the ground that it is irrelevant because the situation, the facts involved in the alleged violation of Control Order No. 1 are not before this Court and cannot be gone into, but I have no objection to the letter. [22]

The Court: Very well. Apparently you are just relying on the record without reviewing any of the facts of law?

Mr. Brand: That's right, your Honor.

The Court: I don't see what aid the letter would be then. Let me see the letter.

Mr. Cosgrave: Yes.

(Document handed to the Court.)

The Court: Well, I can see where it might possibly have some bearing, but you moved for a motion of directed verdict, and I am going to rule on it

one way or the other. Well, I will indicate to counsel when I call the jury back, I will direct them to enter a judgment in favor of the defendant and the Government can follow its own course along the lines that it was suggesting.

Mr. Brand: We will also ask this be introduced.

Mr. Cosgrave: Just in order to make the record complete; the Court won't receive it; if I can just offer it and maybe have it marked as a part of the record?

The Court: You may have it marked.

Mr. Brand: Did I understand the Court correctly, that it would like me to offer this Exhibit 1 in evidence when the jury is present?

The Court: That is the one that was attached to the copy?

Mr. Brand: That is correct. [23]

The Court: In connection with Plaintiff's Exhibit 1, which is a photostatic copy of the letter of May 25, 1951, when I call the jury back, will counsel stipulate that it's a copy of the letter which is attached to the Complaint which was received by the defendant personally?

Mr. Cosgrave: Yes, at the time he was served.

Mr. Brand: Yes, that's right. I think it's February 2nd, according to my records.

The Court: Let's see what the Marshal's return is. The Marshal's return is dated service on February 8th.

Mr. Cosgrave: Yes, we will stipulate that that is a copy of it.

The Court: Do we have a verdict form? I don't suppose we have the verdict form?

Mr. Brand: I am sorry, I didn't prepare one; it completely slipped my mind, I apologize.

The Court: Well, could you go up and have one of your girls prepare one?

Mr. Brand: Certainly. In order to clear the record, in connection with the Complaint, there was a typographical error which I think should be corrected. Paragraph V, Line 2, of Page 2, Line 15, a certification made June, July, August, 1955. It's a little late, but we ask that the words may be stricken.

Mr. Cosgrave: No objection. [24]

The Court: The months of what; what page?

Mr. Brand: Page 2, Paragraph V, Line 15. And we ask that it may be stricken.

The Court: Thank you, it will be stricken. Let's take a recess, then you prepare just a short verdict for the defendant against the plaintiff.

(A short recess.)

(Whereupon, document was marked Defendant's Exhibit Number 3 for identification.)

The Court: I will reverse the two motions that have already been made to allow the Government to reopen their case for the purpose of receiving Exhibit I. I understand that counsel will stipulate that Exhibit 1 is the true and correct copy of Exhibit A attached to the Complaint?

Mr. Cosgrave: It is, your Honor, yes.

The Court: Further that the defendant received a copy of the Complaint together with copies of

Exhibit 1, being Exhibit A to the Complaint, on February 8, 1956.

Mr. Cosgrave: At which time it was served upon him by the United States Marshal in connection with this case.

The Court: Let the record so show. Now, I understand the Government rests?

Mr. Brand: Yes.

The Court: In connection with the Government's motion [25] for directed verdict, it will be denied.

Members of the Jury, while you took your recess, counsel and Court had a conference and it's very obvious that this matter is going to be settled between the lawyer that is representing the Government and Mr. Smith, and as it has now developed through the stipulation of the parties that the facts are all agreed, so it resolves itself purely to a matter of law. So the procedure in the matter which the Court is going to take is to grant a motion for a directed verdict which the defendant has made and then by appropriate motion on the part of the Government this matter then will be submitted to the Court alone purely as a matter of law.

I think you are entitled to be advised as to what became of the case rather than being left up in midstream. The jury always wonders just what happened, and I wanted you to know.

Mr. Cosgrave: Your Honor, I just have one thing before the Court rules, with respect to the exhibit of the defendant which was marked.

The Court: If you are offering it, I will reject it. But it is a matter of the record.

Mr. Cosgrave: Very well, thank you.

The Court: So Mr. Brickell, for the purpose of this matter, I will appoint you foreman of this jury and instruct the jury that as a matter of law you are directed by the [26] Court to enter your verdict in favor of the defendant and against the plaintiff. So, Mr. Brickell, will you be good enough to sign the verdict? Would you date it while you have it there? Will the Clerk please read the verdict.

The Clerk: "United States of America vs. Frank L. Smith. Civil No. 8456. We, the jury, duly impaneled and sworn to try the above-entitled case under the direction of the Court do find our verdict in favor of the defendant and against the plaintiff. Signed Montie Brickell, Foreman. September 20, 1956."

The Court: Members of the Jury, the verdict will be received and filed. This concludes your services in connection with this case and on behalf of the Chief Judge McColloch and Judge Solomon, we thank you for your services and you will be discharged from further consideration of this matter and you may be excused until 10:00 o'clock Tuesday, October 2nd. Tuesday, October 2nd, please.

(Whereupon, the Court was adjourned.) [27]

Certificate

I, William A. Beam, do hereby certify that on September 20, 1956, I reported in stenotype the proceedings occurring in the foregoing matter; that I thereafter caused my said stenotype notes to be reduced to typewriting under my direction, and that the foregoing transcript, consisting of Pages 1 to 27, both inclusive, constitutes a full, true, and accurate transcript of said proceedings so reported by me in stenotype on said date, as aforesaid, and of the whole thereof.

Dated at Portland, Oregon, this 16th day of March, 1957.

/s/ WILLIAM A. BEAM.

[Endorsed]: Filed March 21, 1957.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

United States of America,
District of Oregon—ss.

I, R. DeMott, Clerk of the United States District Court for the District of Oregon, do hereby certify that the foregoing documents consisting of Complaint; Answer; Plaintiff's request for admission of facts and authenticity of documents; Answer to plaintiff's request for admission of facts and authenticity of documents; Verdict; Plaintiff's motion to set aside verdict and for judgment for plaintiff;

Judgment; Plaintiff's motion to set aside verdict, etc.; Order denying motion for judgment notwithstanding verdict and for new trial; Notice of appeal; Plaintiff's motion for extension of time to docket appeal; Order extending time to docket appeal; Designation of contents of record on appeal; Order to transmit exhibits; Transcript of docket entries, and Statement of points upon which appellee will rely, constitute the record on appeal from a judgment of said court in a cause therein numbered Civil 8456, in which United States of America is the plaintiff and appellant and Frank L. Smith is the defendant and appellee; that the said record has been prepared by me in accordance with the designation of contents of record on appeal filed by the appellant, and in accordance with the rules of this court.

I further certify that there is enclosed herewith the reporter's transcript of proceedings. The exhibits will be forwarded at a later date.

In Testimony Whereof I have hereunto set my hand and affixed the seal of said court in Portland, in said District, this 29th day of March, 1957.

[Seal]

R. DeMOTT,
Clerk.

By /s/ THORA LUND,
Deputy.

[Endorsed]: No. 15505. United States Court of Appeals for the Ninth Circuit. United States of America, Appellant, vs. Frank L. Smith, Appellee. Transcript of Record. Appeal From the United States District Court for the District of Oregon.

Filed: April 1, 1957.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

Case No. 15505

UNITED STATES OF AMERICA,

Plaintiff,

vs.

FRANK L. SMITH,

Defendant.

STATEMENT OF POINTS UPON WHICH
APPELLANT WILL RELY UPON APPEAL

The plaintiff appellant, having filed its notice of appeal of the judgment of the District Court in the Court of Appeals for the Ninth Circuit, and having designated portions of the record herein to be contained in the record on appeal, does hereby file this statement of points upon which it intends to rely upon appeal:

1. In this action by the Government to recover meat subsidy payments determined to be due it by an order of the Reconstruction Finance Corporation dated June 25, 1951, the District Court erred in entering a final judgment on the merits in favor of appellee defendant on the basis of the Government's failure to prove appellee defendant's receipt of the order.

2. The Court erred in failing to grant plaintiff appellant's motion to set aside the verdict and for judgment for plaintiff.

3. The Court erred in failing to grant plaintiff appellant's motion for a new trial.

4. The District Court erred in failing to dismiss the action without prejudice to the government's right to make service of the order upon appellee defendant or to issue and serve a new order requiring reimbursement of the subsidy payments.

5. The District Court erred in failing to stay the proceedings with leave to defendant appellee to file a complaint in the Emergency Court of Appeals, challenging the validity of the order of June 25, 1951.

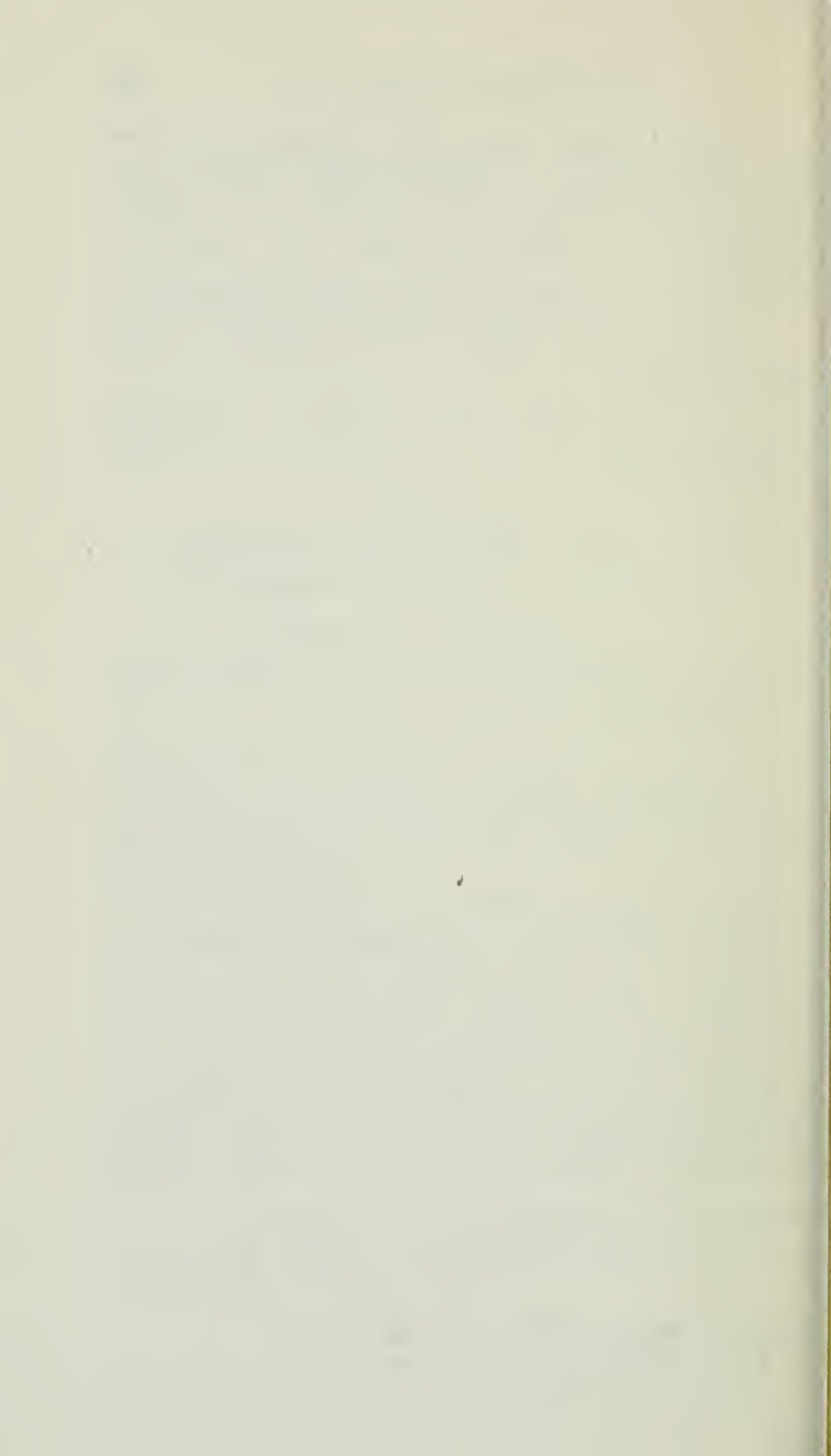
C. E. LUCKEY,
United States Attorney,
District of Oregon;

/s/ THOMAS B. BRAND,
Assistant United States Attorney, of Attorneys for
Plaintiff.

I, Thomas B. Brand, Assistant U. S. Attorney for the District of Oregon, of Attorneys for Plaintiff, certify that I made service upon the defendant of the foregoing Statement of Points Upon Which Appellant Will Rely Upon Appeal, by depositing in the U. S. Post Office, Portland, Oregon, on April 11, 1957, a duly certified copy thereof, enclosed in an envelope, with postage thereon prepaid, addressed to Walter J. Cosgrave, Esquire, Maguire, Shields, Morrison and Bailey, 723 Pittock Block, Portland 5, Oregon, Attorney of record for Defendant.

/s/ THOMAS B. BRAND,
Assistant United States
Attorney.

[Endorsed]: Filed April 13, 1957.



No. 15507.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

ROBERT V. MEDINA,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF.

LAUGHLIN E. WATERS,
United States Attorney,

LLOYD F. DUNN,
*Assistant U. S. Attorney,
Chief, Criminal Division,*

NORMAN W. NEUKOM,
*Assistant U. S. Attorney,
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FILED

OCT 12 1957

PAUL S. GOSSEN, CLERK

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No. 15507.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

ROBERT V. MEDINA,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF.

Statement of Facts.

On July 13, 1956, the victim, Ted Sumpter, an inmate of the Federal Correctional Institution at Terminal Island, California, met his death shortly after 8:00 A. M. of that morning. The incident took place in the Carpenter Shop of such Institution. A diagram or floor plan of such Carpenter Shop substantially as it existed on that date is Exhibit No. 1, which presently has been folded and is in a box containing most of the other Exhibits. This diagram, namely, Exhibit 1, may be helpful in reading the testimony of the various witnesses, for, as they testified, they would from time to time refer to such diagram and place marks thereon in conjunction with their testimony.

It appears to be undisputed that the non-appealing defendant, namely, Lawrence Melvin Miles, was the primary actor in the cause of the death of the victim by plunging a dagger into his back.

There was evidence, if believed by the jury, that the appellant Robert V. Medina participated in the incident taking place shortly before Miles stabbed the victim, in that he hit the victim at least once, if not more times, upon the head and face with a hammer, namely, Exhibit No. 5. The case was tried upon the theory that Medina aided and abetted Miles in the murder of the victim and the jury was instructed accordingly. The instructions to such effect are to be noted in the Clerk's Transcript commencing on page 82 thereof and concluding on page 85.

On the morning of July 13, 1956, approximately 12 inmates had entered the Carpenter Shop of such Institution to perform their daily duties, among which were both of the defendants and the victim, Sumpter.

REX LEON FLOOD. Mr. Flood was, likewise, an inmate of this Institution of Terminal Island. His testimony commences [R. 39].¹ After having first testified that he recognized both of the defendants Mr. Miles and Mr. Medina and, likewise, knew Mr. Ted Sumpter, he testified that he entered the Carpenter Shop on the morning of July 13, 1956, shortly before 8:00 A. M. [R. 41]. Mr. Flood stated that he first went to the work bench that was set up just off the doorway inside the shop, approximately 5 or 8 feet from the drill press. [R. 43.] (According to Exhibit 1, the diagram, this location is approximately in the middle of the Carpenter Shop.) He stated that Mr.

¹"R." refers to the Reporter's typewritten transcript.

Miles was there and that they were working at the same table [R. 43].

He testified that he saw Ted Sumpter as Sumpter came up on the other side of the table and that Mr. Sumpter stated, in the presence of witness Flood and Miles, "I built this for me to use with my work." [R. 44.] Mr. Flood further testified, "Well, he seemed like just his normal manner of conversation. He didn't raise his voice." [R. 44.] Flood further testified that an argument ensued and Sumpter had a hammer in his hand. That after that, "Miles took an offense. He got really mad and said, 'Don't try to push me.' . . . And that is when Sumpter came up with the hammer." [R. 45.]

Flood further testified that after that Sumpter picked up a couple of dowels and went on back with his work. That is to say, he, Sumpter, went back to the little table. a sander back near the back of the Shop [R. 45]. This sander was marked by the witness as "F-2," it is near the westerly side of the Carpenter Shop.

Witness Flood further testified that Miles then left the table and went up to the machine shop tool room [R. 46]. (This machine tool bin or shop is located toward the easterly end of the Carpenter Shop.)

Witness Flood stated that the last time he then saw Miles is as he, Miles, went to the tool room and he indicated the location by placing an "F-3" on the diagram or chart [Ex. 1]. Witness Flood stated that he thereafter saw Miles come out of the tool room and walk back to where Sumpter was and started to argue with Sumpter again [R. 46]. The following questions were asked and answers were given by the witness Flood [R. 47]:

"Q. By Mr. Neukom: Did you hear any loud voices? A. Yes, sir.

Q. Whose voices? A. I heard Miles say, 'If you pull that hammer on me again, be sure and use it.'

Q. And what did you see Sumpter do? A. He was just standing there with his work.

Q. Then what did you see after that? A. Mr. Medina walked up past where I was standing and he said, 'Well, the man is gone. Now is the time to get him.'

Q. Whom did he address that statement to? A. To Miles.

Q. Where was Medina when you heard that?

Mr. Lavine: I move to strike who he addressed it to as a conclusion of the witness, that he addressed it to Miles. I move to strike it out.

The Court: No. I will deny the motion. Let it remain.

Q. By Mr. Neukom: Where was Medina standing when you heard him make the remark you last told us about? A. Approximately about here (indicating).

Mr. Neukom: We will put M-1—we will put ME-1. (Marking on chart.)

Q. And where was Miles? [R. 48.] A. He was standing up this side of the sander.

Q. And it was over about where the 'D' is in the 'Sander'? A. Somewhere—it would be hard to say. He was on this side of the sander.

Q. I see, and we will put MI-1. (Writing on chart.) Now, what ensued, what took place after that? A. Well, Medina grabbed Sumpter around his neck and I saw him hit him with the hammer.

Q. How many times did you see him hit him with the hammer? A. At least twice, before I could turn and get back to the other end of the shop.

Q. What type of hammer did Medina have in his hand? A. It was a ball peen hammer.

Q. And it appeared to be a hammer similar to Exhibit 5? A. Yes, sir.

Q. Where did he hit him? A. You mean Sumpter?

Q. Yes, Sumpter. A. On this side of the head, right here (indicating).

Q. On sort of the top portion of his head? A. Yes, sir."

The witness thereupon indicated the manner in which the incident took place utilizing Mr. Ludlow, an Assistant United States Attorney, for the purpose of this illustration and reaffirmed that Medina had his arm around Sumpter's neck [R. 49] and he indicated how Medina hit Sumpter on the head. He further testified that Miles was to the right of Medina when this event took place [R. 49]. After observing this the witness stated that he came back to the drill press, which is close to the center of the Carpenter Shop, and placed an "F-4" at the point where he stated he had then gone, and, likewise, at "F-5." The witness then stated that after he saw Sumpter laying on the floor between the benches [R. 50].

The witness Flood stated that after this incident occurred Miles came up and said, "Has anybody called a doctor?" [R. 51] and in answer to what he, the witness, said, he replied as follows:

"Well, I didn't say much of anything. We just stood around there for a minute. I was reluctant to leave the shop, because you know around a place like that when something happens you are supposed to see nothing, hear nothing and know nothing." [R. 51.]

The witness then proceeded to relate what then transpired, testifying that he and Miles left the building to summon an officer [R. 52 and 53].

The witness Flood was further interrogated and gave answers as follows [R. 53-54].

“Q. Now, you have testified about Medina having his hand around the neck of Sumpter. Did you hear Sumpter make any remark when that first occurred?
A. Yes.

Q. What do you recall Sumpter saying? A. He said, ‘Knock this stuff off,’ or something to that effect, to the effect ‘Knock this stuff off.’

Q. Had Sumpter just immediately prior to that been engaging himself in his work? A. Yes, sir.

Mr. Lavine: That is objected to as calling for a conclusion of the witness, and I move that the answer be stricken, your Honor.

The Court: No, I will deny the motion.

Q. By Mr. Neukom: What had you seen Sumpter doing? A. Sanding the little dowels that were six inches long that we were using to stop the ends of those beds. They were too large to fit and he was sanding them off.

Q. The beds were hollow steel beds; is that what you mean? A. Yes, sir.

Q. And you were working placing dowels in the end of them and driving them in? A. Yes, sir.

Q. Is that the proposition? A. Yes.

Q. And that was the work that you had noticed Sumpter doing? A. Yes, sir.” [R. 55.]

The witness was then cross-examined and such cross-examination extends from page 56 through a portion of page 69.

Upon redirect examination the witness explained why he had asked for protective custody in that he felt for his safety [R. 69]. Witness Flood further stated from his observations the victim Sumpter did not appear to be the quarrelsome type and that he had never seen Sumpter in any trouble before.

SAMUEL D. COLLINS. This witness was likewise an inmate of the Institution. He had also served time for State offenses in a California prison. He stated that he met the victim and, in fact, slept in the same dormitory and that the victim had had a bed on his left side, and that this took place for a period of 3 or 4 months [R. 810]. Witness Collins gave testimony solely concerning the peacefulness of the victim. His answer to such a question was as follows:

“The Witness: Well, in the first place, Sumpter was a very quiet man, a very well behaved man, didn’t bother anyone. Well, to use an expression, he was doing his own time.

Q. By Mr. Ludlow: What does that mean, doing his own time? A. Minding his own business.” [R. 811.]

When further interrogated he stated with respect to the victim, “He was not a quarrelsome person; just the opposite” [R. 812], and further stated that he had never seen any quarrels going on in which Mr. Sumpter was involved [R. 817].

TRINIDAD MADA LEON. Witness Leon was likewise an inmate of the Institution. He stated that he did not see Medina do anything to Sumpter [R. 73]. He placed Medina near Sumpter, stating they were talking, arguing, or something like that and that he saw Medina have a hammer in his hand and that he took the hammer from

Medina [R. 74], that Medina was very close to Sumpter and that Miles was on the left side of Sumpter, namely, on the right-hand side of Medina [R. 75]. Witness Leon further testified that he looked at Sumpter's face and eyes for just a fraction of a second before Sumpter fell over and that Sumpter's eyes looked "glassy" and that is when he pulled the hammer from Medina [R. 80]. The witness explained where he took the hammer and where he dropped it over on the side of the table.

EDWARD ALLEN SHIVEL. This witness was likewise an inmate of the Institution. He stated that on the morning of July 13, 1956, he saw Medina with a hammer in his, Medina's hand, and he also saw Sumpter with a hammer in his, Sumpter's hand, and that it looked to him like Sumpter was taking a swing at Miles and that after that he saw Leon take a hammer away from Medina [R. 254-255].

This witness further explained, "Well, you can usually tell when somebody is going to get in a fight, so you just naturally don't pay any attention. And . . ." [R. 255].

After the witness had indicated where both Medina and the others were concerning the incident he had testified to, he stated that thereafter he saw Sumpter go down on the floor [R. 258].

LAWRENCE MELVIN MILES. This co-defendant, who was found guilty of second degree murder, has not appealed and inasmuch as appellant Medina has referred to certain of his testimony in his brief under the heading "The Facts" we shall but briefly refer to his testimony.

Defendant Miles admitted that he had prepared Exhibit 8 into a knife about 3 weeks prior to the time of "the ac-

cident” [R. 715]. He had explained why he walked up to Sumpter with the knife hidden in his jacket and had let Sumpter know he had had a knife because he didn’t want to fight Sumpter and because he was scared of him, and that he had told Sumpter never to come near him again with a hammer and that is when Medina first walked up [R. 697-698].

Defendant Miles then proceeded to relate where he had concealed the knife made from a chisel and his version of how the incident occurred. Defendant Miles conceded upon cross-examination that he was a friend of the witness Flood and that he had had no quarrel with Flood [R. 733].

ROBERT VICTOR MEDINA. Mr. Medina, the sole appellant to this case, appeared as a witness on his behalf. His testimony commences on page 751 and since this testimony is relatively short and is, of course, of the utmost importance to Mr. Medina we shall refrain from attempting to summarize the testimony he gave on direct examination recognizing that this court will carefully read all of such testimony.

It is, however, to be observed that when Mr. Medina testified that he conceded he was present during an argument that he stated was transpiring between the victim and Miles and that, in fact, he stated to Sumpter “Knock it off” [R. 758]. The appellant Mr. Medina further testified concerning his version of the incident between Miles and Sumpter and with respect to the ball peen hammer [R. 759].

Medina stated that he did not at any time strike Sumpter and that he did not at any time intend Sumpter to be killed or injured and that after the incident had occurred

where the hammer had been taken out of his, Medina's, hand, that Medina walked away, that is, back to the tool bin where he stated he had started to originally [R. 763].

The cross-examination of the defendant Medina commences on page 770 of the Reporter's Transcript. That portion which deals with the inquiry of previous sentences imposed on Medina by the Military court in Korea will be referred to later under a subject heading dealing with the propriety to make such inquiry which has been challenged as error on page 18 of appellant's opening brief.

During the further portion of such cross-examination Medina was inquired of if he had been interviewed by Mr. Walker (an FBI Agent) at about 3:45 on the afternoon on the day that Mr. Sumpter met his death. His answer was "A—Oh, yes, I remember that emphatically." Mr. Medina then proceeded to state that during such interview he did not even answer his name "or nothing" [R. 773].

Counsel then representing the Government sought to lay a proper foundation concerning the interview had on the afternoon of February 13, 1956, between FBI Agent, Mr. Walker, and the defendant Medina. This was done upon the premise of impeachment, namely, that Mr. Medina had given a contradictory or inconsistent statement at such time to the FBI Agent, Mr. Walker, wherein Medina had then denied any participation in the incident pertaining to the death of Sumpter.

After which and commencing on page 774 of the Reporter's Transcript several questions were put to the defendant Medina in the form of laying a foundation as to whether he had told Agent Walker certain things when interviewed in the afternoon of July 13, 1956.

This will not be repeated at this point. Suffice is to say, Medina stated that he did not tell Walker anything. In fact, he stated he told Walker "absolutely nothing."

KENNETH C. WALKER. Mr. Walker was one of the FBI Agents assigned on July 13, 1956, to conduct an investigation pertaining to the death of Mr. Sumpter. He stated that about the hour of 3:45 P.M. he interviewed Medina on July 13, 1956, in the office of the Associate Warden [R. 788], and that he made a log as to the period of time and a memorandum of the interview. This was marked in identification as Government's Exhibit 54 [R. 789].

At this point objection was made to such testimony. The Government sought permission to reopen its case and the Court granted such request [R. 791]. Counsel for Mr. Medina was permitted to take Mr. Walker upon *voir dire* and examined the FBI Agent Walker pertaining to his notes, namely, Exhibit 54, of the interview had with Mr. Medina. Among other things, Mr. Walker stated that the defendant Medina had denied knowledge of the stabbing incident [R. 795]. Mr. Walker then proceeded to state all the information he had secured on that afternoon from the defendant Medina, such as his name, his age, place of birth, home address, etc. [R. 797-798]. Agent Walker then proceeded to state the substance of what information Medina had given him in such interview concerning the Sumpter homicide. The sum and substance of such testimony was that Medina had denied any participation in the incident pertaining to the death of Sumpter, but instead had said that he was to the other end of the Carpenter Shop in the machine tool bin during such incident and that at no time had he approached or went near where Sumpter was located and

that he only saw Sumpter when he, Sumpter, was being carried from the machine Carpenter Shop [R. 799-800]. Also see Exhibit 54 for identification, Agent Walker's notes of this interview.

DR. GERALD K. RIDGE. Dr. Ridge was the autopsy surgeon who performed the autopsy on the body of the victim. He testified concerning wound No. 1, a dark reddish area or an abrasion underlying the left cheek of the victim, and of wound No. 2, a wound on the left back portion of the scalp [R. 548]. The Doctor stated that in his opinion it would be possible for the hammer, Exhibit 5, to produce the wound occurring on the head of the victim, namely, wound No. 2 [R. 556]. The Doctor likewise testified as to the third wound, namely, a stab wound, which was undoubtedly the primary cause of the death. His conclusion as to the cause of the death is to be noted [R. 567]. In response to an inquiry concerning a violent blow, the Doctor's testimony was as follows:

“Q. Doctor, the actual bone on the top of the head was not fractured, was it? [R. 585.]

A. No, it was not.

Q. And if there had been a violent blow on the head, it is most likely that the skull would have been fractured, isn't that right, Doctor? A. No. That does not follow.

Q. Well, would it follow in the normal course of events, would a real violent blow on the head with a hammer result in a skull fracture? A. Not of necessity.

Q. Not of necessity? A. No, sir.”

We note what we believe to be a mistake on page 4, line 6 of appellant's opening brief, to the effect that

Sumpter “. . . had a previous conviction for checks” to his sentence in violation of the Dyer Act. We recall no such testimony, however each and all of the inmates were, of course, persons convicted of one or more offenses.

The Judgment, or Sentence. The judgment and sentence is on pages 101 and 102 of the Clerk’s Transcript, as to the defendant Medina it was, “. . . for imprisonment for a period of Ten Years, to be served concurrently with the sentence the defendant is now serving. . . .”

I.

There Was Sufficient Evidence to Support the Verdict as to the Guilt of Medina. The Court Properly Denied the Motion for Judgment of Acquittal.

The case was tried upon the theory that Miles and Medina were joint participants in the acts that led to the death of the victim Sumpter. The jury was so instructed, especially as to the rule of law pertaining to “Principals” and aiding and abetting the commission of an offense. [See Clk. Tr.² p. 82 *et seq.*, where the court correctly instructed the jury in accord with 18 U. S. C., Sec. 2, “Principals”.]

It is true that there was a conflict in the testimony between that of the witness Flood and the defendants, however, there was evidence, if believed by the jury, to the effect that Medina had used a hammer and struck Sumpter on the head at or prior to the time that Miles ran the dagger, Exhibit No. 8, into the back of Sumpter [R. 48].

²Clk. Tr. refers to the Clerk’s typewritten Transcript of Record.

There was also evidence to the effect that just prior to the stabbing Medina stated to Miles.

“. . . Well, the man is gone. Now is the time to get him.” [R. 47.]

Also that at the time of the accident Medina grabbed Sumpter around his neck and hit Sumpter with the hammer [R. 48-49]. Thus there was evidence of voluntary joint participation by Medina in the fight that culminated in Sumpter's death. Credibility and conflict were matters for the jury to decide.

The evidence is also susceptible of the conclusion that any quarrel that had previously been going on at the outset between Miles and Sumpter had subsided and that Sumpter had returned to his work when shortly thereafter he was attacked by Miles and Medina and as a result met with his death [R. 45].

The requirements as to what constitutes Manslaughter, *i.e.*, Voluntary *Manslaughter* as provided for by the Federal Statute, *i.e.*, 18 U. S. C. A., Sec. 1112(a), had been fully met:

Sec. 1112 “*Manslaughter*

(a) Manslaughter in the unlawful killing of a human being without malice. It is of two kinds: ‘Voluntary—Upon a sudden quarrel or heat of passion’.”

The Court was careful to instruct on the elements required to be established both as to Murder and Manslaughter and no objection was made to such instructions. Such was likewise the case as to the law applying to self defense and the non-requirement to retreat before one may act lawfully in self defense. The instructions submitted by the defense on these issues were numerous, and

they were rightfully given by the Court. By way of illustration, instructions given dealing with subjects such as "accident," "the use of necessary force to protect from wrongful injury," the right of "self defense," and kindred defenses, start at page 72 of the Clerk's Transcript and continue on through a portion of page 82 of such transcript.

The quarrel between Miles and Sumpter, had subsided upon Sumpter's peaceful return to his work [R. 45]. Medina had not been a party to this original incident, and could not justify his participation in the later conflict which resulted in Sumpter's death. His option to so participate was surely voluntary, unwarranted, and was sufficient to justify the jury's verdict of Voluntary Manslaughter.

The rule that pertains to a Motion for Acquittal is Rule 29 of the F. R. C. P.

The case of *Curley v. United States*, 160 F. 2d 229 (C. A. D. C., 1947), cert. den. 331 U. S. 837, reh'g. den. 331 U. S. 869, applies to the conflict in this case. The holding in the *Curley* case, regarding matters to be considered by the Court in ruling upon such a motion is that if the evidence reasonably permits a verdict of acquittal or a verdict of guilt, the decision is for the jury to make (*ibid.* pp. 232-233).

The trial court was correct in its rulings and is fully supported by the evidence of the case and the governing law. When a motion for a judgment of acquittal is made, the law appears to be that the sole duty of the trial judge is to determine whether substantial evidence, taken in the light most favorable to the Government, tends to show the defendant is guilty beyond a reasonable doubt. *Hemp-hill v. United States*, 120 F. 2d 115, 119 (C. A. 9), cert.

den. 314 U. S. 627; *Mills v. United States*, 194 F. 2d 184 (C. A. 4); *Pritchett v. United States*, 185 F. 2d 438 (C. A. D. C.), 341 U. S. 905; see also *Gorin v. United States*, 111 F. 2d 712 (C. A. 7), 721 (C. A. 9), aff. 312 U. S. 19. No quantity of contradictory evidence will authorize the trial court to direct a verdict if there is sufficient substantial evidence to take the case to the jury. *Ross v. United States*, 197 F. 2d 660, 665 (C. A. 6). The Court of Appeals in considering the question presented when a judgment of acquittal has been denied should not weigh conflicting evidence, for the weight of conflicting evidence is not for the Court of Appeals, which Court will only determine questions of the sufficiency of Government's testimony to go to the jury and to sustain the verdict of conviction. *May v. United States*, 175 F. 2d 994, 1006, 1007 (C. A. D. C.), cert. den. 338 U. S. 830, citing as authority the *Curley* case (160 F. 2d 229). To like effect *Elwert v. United States*, 231 F. 2d 928, 933 (C. A. 9, 1956).

Substantial evidence has been defined. *Woodward Laboratories, Inc., et al. v. United States*, 198 F. 2d 995 (C. A. 9, 1952), p. 978:

“Substantial evidence is . . . such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.”

See also:

Battjes v. United States, 172 F. 2d 1, (C. A. 6, 1949).

The Court was likewise careful to instruct on the subject of “Manslaughter” [Clk. Tr. p. 68]. “Heat of Passion and Provocation” [Clk. Tr. p. 68].

II.

No Error Was Committed by the Court in Permitting Cross-Examination of the Defendant Regarding His Two Military Convictions Sustained While in Korea.

It is true that it is the more favored practice, for the purpose of impeachment, to inquire of a defendant who gives testimony as to whether or not he has ever been convicted of a felony, one or more, and then to elicit the nature or character of such conviction and then rest the matter of such inquiry. However, in this case, no doubt for the purpose of taking the sting out of such impeachment, which is generally left to the cross-examination, the second question counsel for the defense placed to the defendant Medina was not if Medina had been convicted of a felony, rather, as follows [R. 751]:

“Q. And are you serving a military sentence at the present time? A. I am.

Q. And the sentence is for what offense? A. Murder.

Q. Mr. Medina, did you get sentenced by a court or by a court martial? A. I got sentenced by a general court martial of the United States Army in Korea.

Q. And were you in the army of the United States in Korea at the time? A. I was.”

This inquiry was not followed by asking the defendant if the conviction of murder was the only felony type conviction he, Medina, had sustained. Surely, counsel for the defense must have been aware that Medina had sustained a prior military conviction of a felony nature, besides that of the murder conviction that he so willingly produced by his second question to his client Mr. Medina.

The question complained of, that the prosecution put to the defendant Medina concerning a "previous sentence" of "seven years" was asked in perfect good faith [R. 770]. The prosecutor was possessed of information to the effect that Medina while in Korea had, in addition to his conviction of murder, received a seven-year sentence by court martial for violations of Articles of War 61, 64, 69 and 98, following which, he, Medina, had escaped on March 12, 1946, from the stockade at Pung Song and on the following day Medina was involved in the killing by knifing of a Military Police Officer at Seoul, Korea.

It is true there was no evidence introduced to support the above statement; such would hardly have been proper. However, it was known to the prosecutor that such a seven year sentence had been imposed, which certainly constitutes an offense of a felony as defined by 18 U. S. C., Section 1.

No effort was made by the government to introduce a certified copy of such Military sentence of seven years, but instead the prosecutor quite properly inquired of Medina if he had also sustained such conviction. He, Medina, was inquired of:

"Q. As a matter of fact, the murder that you were convicted of was following your escape from another sentence, wasn't it? A. It was." [R. 772.]

The prosecution did not pursue the matter further nor offer any additional evidence of such prior Military conviction although it would have been privileged to have done so.

The possible error of such inquiry was also offset by an answer the defendant Medina made prior to admitting such previous sentence, because he was permitted to state

his entire explanation of such sentence which surely had a tendency to paint him as a freed man and one that asserted he had done a heroic act so far as the Russian secret police were concerned, for he, Medina, also testified as follows [R. 771]:

“The Witness: That sentence that you claimed there, sir, was disavowed by the President of the United States afterward, and I did not know it was disavowed or made void because I had got convicted of—maybe you will find it there—of mayhem against the Russians secret police and they were stealing horses which they had stolen from us, I had stolen them back, so they claimed, and I received the seven years. Believing it to be unjust, I told them in exact words, ‘You can’t hold me. I’m leaving.’ So I left.” [R. 771].

It has been held that although the cross-examination pertaining to convictions was allowed to take a somewhat wider range than is ordinarily justified, that since the defendant admitted the conviction no prejudice results and the matter is one largely within the discretion of the trial court. *Arnette et al. v. United States*, 158 F. 2d 11 (C. A. 4, 1946).

A case somewhat comparable to the instant one is *Banning v. United States*, 130 F. 2d 330 at page 338 (C. A. 6, 1942). In the *Banning* case, upon cross-examination the defendant was asked if he had not thrown red pepper in the Deputy Sheriff’s eyes and took his pistol from him and shot the Deputy while he was being transferred to prison. This inquiry was considered not proper, but nevertheless held not to be reversible error, inasmuch as the defendant admitted the incident occurred, but that another prisoner was the guilty person

and that he had taken no part in the incident. The Court stated at page 338:

“. . . Appellant answered the question favorably to himself and there was no effort to rebut his answer. Thus, as the record stands there is no evidence that he committed the offense about which the District Attorney questioned him” (citing cases).

Such was likewise the situation in the instant case.

It is of course well settled that when a defendant attempts to exonerate himself of charges made against him, his credibility as a witness is in issue and evidence of prior convictions are admissible for that purpose. *Newman v. United States*, 220 F. 2d 289 (C. A. 5, 1955) (Cert. Den. 350 U. S. 824).

Where a defendant on direct examination testified as to a conviction for one crime committed in Italy he could properly be cross-examined on the subject of other convictions in Italy. He could likewise be cross-examined as to statements made in his application for immigration visa and naturalization which failed to disclose such convictions. *United States v. Rossi*, 219 F. 2d 612 (C. A. 2, 1955) Cert. Den. 349 U. S. 938.

It has been held by the California courts that although a prior conviction was admitted that it was not error to cross-examine as to such previous conviction. *People v. Garrow*, 278 P. 2d 475, 481 (1955), 130 Cal. App. 2d 75 Cert. Den. 349 U. S. 933.

III.

No Error Was Committed by the Court in Permitting the Cross-Examination of Medina Concerning a Statement He Had Given to FBI Agent Walker.

On page 20 of appellant's opening brief it is urged that the cross-examination of Medina concerning a statement he had given to FBI Agent Walker exceeded the scope of the direct examination.

We shall endeavor to show (1) That such examination was proper on the theory of impeachment by the use of an inconsistent or contradictory oral statement made by Medina on the afternoon of the murder to the testimony he gave on direct examination; and (2) That such cross-examination was proper and not beyond the scope of the direct examination, in view of the testimony offered by Medina upon direct examination.

In the course of FBI Agent Walker's investigation he and other agents attempted to interview all inmates who had been in the Carpenter Shop on the morning of July 13, 1956. In so doing at about 3:45 P.M. of that afternoon he interviewed Medina and made notes of such interview. [See Ex. 54, Agent Walker's notes of such interview.]

This interview resulted in Medina disclaiming any participation in the incident leading to the death of Sumpter, he gave Agent Walker an exculpatory statement. Such being so, the government obviously would not attempt upon its case in chief to have Agent Walker testify to a statement made by Medina that freed Medina from any complicity in the homicide. This statement was not material until Medina had given a different version of the incident during his testimony to that which he had

stated to Agent Walker. Medina conceded that he was interviewed by Mr. Walker on the day that Mr. Sumpter met his death, he respondent:

“A. Oh, yes, I remember that emphatically.”
[R. 773.]

Medina then proceeded to state that he told Walker “nothing” . . . “did not even answer my name” [R. 773]. After having admitted the interview but denying making the statement the government proceeded to lay a foundation for impeachment, questions in that regard started at page 774, line 14 and continue for several pages of the Reporter’s Transcript.

After the conclusion of the testimony of Mr. Medina, Agent Walker was recalled to the stand for the purpose of relating the substance of the statement taken from Medina in conflict with the testimony Medina had given at the trial.

Case Reopened. The defense objected and permission was requested by the government to reopen the case, which request was granted [R. 791]. It appears to be elementary that a case may be opened for further evidence in the discretion of the trial court. Cyc. of Federal Procedure, Vol. 12, Sec. 58:135. To like effect, *Kuhn v. United States*, 24 F. 2d 910, 914 (C. A. 9) Cert. Den. 278 U. S. 605; *Lutch v. United States*, 73 F. 2d 840, 841 (C. A. 9). *Hangen v. United States*, 153 F. 2d 850 (C. A. 9).

Mr. Walker’s testimony concerning the statement he had taken from Medina clearly effected his credibility. In the statement Medina had made to Agent Walker on the afternoon of the homicide Medina had among other things denied any participation in the incident that led to the

death of Sumpter, indeed, he had stated that he was at another end of the shop—"that he had remained in the machine tool bin, and that he at no time approached or went near where Sumpter was located and that he only saw Sumpter when he was being carried from the machine carpenter shop." [R. 799-800.]

It is settled law that a defendant who takes the stand may be cross-examined the same as any other witness. *Madden v. United States*, 20 F. 2d 289, 292 (C. A. 9, 1927), cert. den. 275 U. S. 554; *Raffel v. United States*, 271 U. S. 494 (1926).

This court has stated, *Cossack v. United States*, 63 F. 2d 511 (C. A. 9, 1933), p. 516:

"It is elementary, of course, that on cross-examination a witness may be asked whether he did not make certain statements inconsistent with his present testimony." (citing cases).

It is not error to require a defendant offering himself as a witness upon a second trial and denying the truth of evidence offered by the prosecution to disclose upon cross-examination that he had not testified at the first trial, and to explain why he did not deny the same evidence when then offered. *Raffel v. United States*, 271 U. S. 494 (1926).³

The propriety of introducing statement made by a witness at another time for the purpose of impeachment seems

³It is true that the *Raffel* case has been recently distinguished by the Supreme Court in: *Grunewald v. United States*, 353 U. S. 391, 418 (1957). In the *Grunewald* case, one of the defendants had been subpoenaed before a grand jury, his refusal to answer upon the grounds of self incrimination, offered for the purpose of impeachment, was held to have been erroneously presented at his later trial.

to be firmly established. *Ryan v. United States*, 58 F. 2d 708, 710 (C. A. 7, 1932); *Lee Dong Sep v. Dulles*, 220 F. 2d 264 (C. A. 2, 1955); *Mahoney v. United States*, 26 F. 2d 902 (C. A. 4, 1928) (Rev. on other grounds).

(1) When a Defendant Testifies to His Intent Wide Latitude Should Be Permitted Upon Cross-Examination.

Medina had testified upon direct as to his non-complicity in the incident, except by accident, and of his non aiding or abetting Miles in the use of the knife [R. 761] and that he did not at any time use the hammer on the head of Sumpter [R. 762]. He did however testify concerning the scuffle between Miles and Sumpter and his participation and of his explanation of how it occurred [R. 758-762]. This despite the fact that on the very afternoon following the death of that morning he had denied any complicity with the Sumpter-Miles incident. It hence became material to attack his credibility through cross-examination.

The scope that is permitted of cross-examination of a defendant is well stated in *United States v. Lowe*, 234 F. 2d 919, 922 (C. A. 3, 1956):

“The second reason why there was no error in the exploration of this subject is that it was cross-examination. When a defendant takes the stand in a criminal case he is subject to cross-examination as any other witness is. No authority needs to be cited for the proposition that one of the purposes of cross-examination is to test the credibility of the witness and, subject to the judge’s control, that cross-examination may go rather far. The scope of direct examination poses no limitation in this respect. Here the cross-examination was very material in testing the credibility of the defendant. See *United States*

v. Pagano, 2 Cir., 1955, 224 F. 2d 682, 685, certiorari denied 350 U. S. 884, 76 S. Ct. 137.”

This court has stated in *Austin v. United States*, 4 F. 2d 774, 775 (C. A. 9, 1925):

“. . . But it is not prejudicial error to admit testimony in rebuttal which should have been offered as part of the main case, unless the party against who the testimony is admitted is denied the right to controvert or contradict it, and there was no denial of that right in this case.”

As stated in *Raffel v. United States*, 271 U. S. 494 (1926) p. 497:

“. . . His waiver is not partial; having cast aside the cloak of immunity, he may not resume it at will, whenever cross examination may be inconvenient or embarrassing.”

And as said in *Davis v. United States*, 229 F. 2d 181 186 (C. A. 8, 1956):

“Mr. Justice Sutherland, sitting as a Circuit Justice in the case of *United States v. Manton*, 2 Cir., 107 F. 2d 834, 845, said:

* * * The office of cross-examination is to test the truth of the statements of the witness made on direct; and to this end it may be exerted directly to break down the testimony in chief, to affect the credibility of the witness, or to show intent. The extent to which cross-examination upon collateral matters shall go is a matter peculiarly within the discretion of the trial judge. And his action will not be interfered with unless there has been upon his part a plain abuse of discretion. 3 Wharton's Criminal Evidence (11th Ed.) §1308. See *Alford v. United States*, 282 U. S. 687, 694, 51 S. Ct. 218, 75 L. Ed. 624.’”

The cross-examination was germane to the testimony brought out upon direct examination. The proper limit for fair cross-examination is a matter within the sound discretion of the trial court. A defendant who takes the stand may be cross-examined as fully as any other witness. (*D'Aquino v. United States*, 192 F. 2d 338, 369 (C. A. 9, 1951), and many authorities therein cited, including *Powers v. United States*, 223 U. S. 303 at p. 315.) This is the rule concerning matters pertinent to his examination in chief. The cross-examination in the *Powers* case, which was approved, brought out defendants working near a still. To similar effect, *Berra v. United States*, 221 F. 2d 590 at pages 594 and 597 (C. A. 8, 1955). If a defendant testifies to his intent, the field is rather wide open on cross-examination as to all other relevant facts. *United States v. Bradley*, 152 F. 2d 425, 427 (C. A. 3, 1945), where it is stated on page 426:

“ . . . The decision of the Supreme Court in *Johnson v. United States*, 318 U. S. 189, 195, 63 S. Ct. 549, 552, 87 L. Ed. 704, is pertinent. Mr. Justice Douglas stated, ‘His (the defendant’s) voluntary offer of testimony upon any fact is a waiver as to all other relevant facts, because of the necessary connection between all.’ ”

The extent to which the broad cross-examination of a defendant is allowed is noted in the case of *United States v. Buckner*, 108 F. 2d 921, 927 (C. A. 2, 1940).

To similar effect *re* cross-examination of a defendant: *Salerno v. United States*, 61 F. 2d 419, 424 (C. A. 8, 1932), where on page 424:

“The right of cross-examination is not confined to the specific questions or details of the direct examination, but extends to the subject matter inquired about.”

IV.

The Questioning by Agent Walker of Medina Did Not Violate Any Constitutional Right of Appellant nor Was It Adverse to the McNabb Rule.

The record will clearly reveal that the Agents of the FBI were questioning, and properly so, all inmates who had been in the Carpenter Shop on the morning that Sumpter was killed. Medina was questioned at about 3:45 P. M. of the afternoon of that same day [R. 788]. The *McNabb* rule (318 U. S. 332) does not control; rather, the case that is controlling is the later Supreme Court case of *United States v. Carignan*, 342 U. S. 36 (1951). In the *Carignan* case the *McNabb & Upshaw* (335 U. S. 410) are distinguished.

In the *Carignan* case, as here, the confession, which was objected to but which the Supreme Court held was proper, was obtained from an accused who was in custody with respect to a previous arrest or charge. In the instant case Medina's detention was legal because he was serving a sentence for murder committed in Korea. In the *Carignan* case the accused was being held for another offense, namely, for an assault charge, when during such custody he gave a confession admitting another offense, namely, murder. In neither case was there an unlawful detention. Under such circumstances Rule 5 of the Federal Rules of Criminal Procedure did not then apply because Medina was not under arrest for the murder of Sumpter. He was merely being interrogated as to what he knew, if anything, concerning such incident. There was no occasion to have then brought him before a magistrate because he

was already lawfully in custody and was not then arrested for complicity in aiding in the killing of Sumpter. As stated in the *Carignan* case, page 44:

“The police could hardly be expected to make a murder charge on such uncertainties without further inquiry and investigation. This case falls outside the reason for the rule, *i.e.*, to abolish unlawful detention.”

The true test in all instances is whether the statements, admissions or even exculpatory statements were voluntary or not and, as the Court stated on page 39 of the *Carignan* case, the rule is as follows:

“So long as no coercive methods by threats or inducements to confess are employed, constitutional requirements do not forbid police examination in private of those in lawful custody or the use as evidence of information voluntarily given.”

In the *Carignan* case it is further stated (p. 45):

“. . . We decline to extend the McNabb fixed rule of exclusion to statements to police or wardens concerning other crimes while prisoners are legally in detention on criminal charges.”

It is further to be recalled that when Medina was interviewed on the afternoon of July 13, 1956 by Agent Walker, he made no admission or confession, Medina then denied any complicity in the incident that caused the death of the victim [R. 799-800] also see Exhibit 54.

V.

No Error Was Committed in Giving the “Allen” Instruction. Generally, a Juror’s Affidavit Is Not Admissible to Impeach the Verdict.

The Clerk’s Transcript, page 103, contains a copy of an affidavit of one of the jurors, namely, Carolina A. Resch, to the effect that she was influenced and caused to surrender her views of not guilty by an instruction given during the second day of deliberations. This is the so-called “Allen” instruction. It appears in the Clerk’s Transcript commencing on page 93. The propriety of this instruction has repeatedly been sustained by this Court. One of the more recent decisions in approval of such instruction is *Hutson v. United States*, 238 F. 2d 167, 173 (C. A. 9, 1956).

To like effect:

Shibley v. United States, 237 F. 2d 327-333 (C. A. 9, 1956);

Kawakita v. United States, 190 F. 2d 506, 521 (C. A. 9, 1952), *affd.* 343 U. S. 932;

Allen v. United States, 164 U. S. 492, 501 (1896).

On a Motion for New Trial, affidavits and testimony of jurors ordinarily are not admissible to impeach the verdict, at least where the matter sought to be raised is inherent in the verdict and no corruption or extraneous influence from the outside is involved. In accordance with public policy ordinarily jurors in a criminal case in the Federal Courts will not be heard for the purpose of impeaching their verdict. *Cyc. of Fed. Proc.*, Vol. 11, Sections 48.373 and 49.53.

An early and often quoted authority on the proposition that public policy forbids that a matter resting in the personal consciousness of one juror should be received to overthrow the verdict is that of *Mattox v. United States*, 146 U. S. 140, 148 (1892)—unless they arise from facts of outside or extraneous influence.

To like effect with regard to an attempt to impeach a verdict with a matter which inhered in the verdict.

Bryson v. United States, 238 F. 2d 657, 665 (C. A. 9, 1956).

United States v. Furlong, 194 F. 2d 1, 4 (C. A. 5, 1952), cert. den. 343 U. S. 950 p. 4:

“It is axiomatic that an affidavit of a juror as to what occurred in the jury room during the deliberations of the jury, will not be considered, for sound public policy prohibits impeachment of a verdict by a member of the jury who participates in it.”

Armstrong v. United States, 228 F. 2d 764, 768 (C. A. 8, 1956);

Young v. United States, 163 F. 2d 187, 188 (C. A. 10, 1947), cert. den. 332 U. S. 770.

Indeed, there is considerable authority that generally jurors should not be questioned after their verdict, and that such questioning is disapproved:

United States ex rel. De Vita v. McCorkle, 133 Fed. Supp. 169, 179 D. C. N. J., 1955);

United States v. El Rancho Adolphus Products, Inc., 140 Fed. Supp. 645, 653 D. C. Pa., 1956).

There is nothing in the affidavit of juror Resch [Clk. Tr. 103] of facts to show any improper extraneous influence, indeed the matters there recited essentially inhere in the verdict.

In Conclusion.

It is respectfully submitted that the judgment of conviction herein being reviewed should be affirmed.

Respectfully submitted,

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No. 15520

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

JULES POND,

Appellant,

vs.

GENERAL ELECTRIC COMPANY, a corporation,

Appellee.

REPLY BRIEF OF APPELLANT.

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Appellant,

vs.

GENERAL ELECTRIC COMPANY, a corporation,

Appellee.

REPLY BRIEF OF APPELLANT.

Appellee's Statement of the Case.

Attempting to condense 17 pages of the printed transcript of record into three and one-half pages of their brief, counsel have achieved brevity at the expense of accuracy. The law makes one answerable for what he insinuates as well as for what he states explicitly. (*Bates v. Campbell*, 213 Cal. 438, 442, 2 P. 2d 791.) Appellee's partial review of the complaint omits such things as the doubt implanted by the offending letter as to Mr. Pond's loyalty, honesty, competence and ability to get along with people. Appellee's statement is neither complete, nor accurate, nor fair.

Complete Silence Is Not Our Problem.

Appellee has taken great pains to ferret out what it says is the only reported case holding that an employer has a legal right to remain silent. The cited case of *New York, Chicago & St. Louis R.R. Co. v. Schaffer*, 65 Ohio St. 414, 62 N. E. 1036, was a case in which the defendant railway company refused to give the plaintiff, a brakeman whom it had discharged, a statement or certificate of his service for the company. The Ohio court held that such refusal was not actionable.

But in the instant case we are not concerned with what would have been the law applicable if I.G.E. had refused to answer the letters of inquiry. Appellee purported to answer the inquiries, but in such a manner as to cast doubt upon the genuineness of its letter of reference addressed to plaintiff [Ex. A, Tr. pp. 15-18]. Having undertaken to answer the inquiries, appellee was legally bound to answer forthrightly and in accordance with facts well known to it.

Moreover, G.E. was legally bound to refrain from using language which, when read in conjunction with the letters of inquiry and the reference letter [Ex. A], would indicate that G.E.'s information concerning Pond rendered him not worthy of recommendation. Emphasis to this postulate must be added when the subject of inquiry concerns "what jobs held," or such basic attributes as loyalty, competence, integrity, or ability to get along with people. Any employer knowing an employee for even 17 short months would have ready responses to such inquiries. *The vice of the letter is multiplied by the background of 17 years of faithful service and by the absence of any information in G.E.'s files to justify their negative reply.* [Complaint, pars. IV and XIII.]

If a prospective employer inquires about a man's honesty or loyalty and the prior employer says, "I am unable to give first hand information. I don't want him back," is not that language equivalent to saying that the prior employer means, "I would not care to recommend him as to his honesty or loyalty from my experience with him"? Can an employee with an unblemished record be without redress against the prior employer who so defames him?

If a man's competence is the subject of inquiry and the reply covers the better part of a printed page of details not responsive and not solicited and this same reply pointedly ignores the matter of competence, can a favorable inference be drawn? Now add the gratuitous statement that the employee would not be rehired on the basis of his record, and there can be no reasonable doubt as to the writer's meaning. The foregoing more than satisfies the plaintiff's burden. He only need show that the defamatory meaning was *possible*. (*Baker v. Warner*, 231 U. S. 588, 594, 34 S. Ct. 175, 58 L. Ed. 384.) By their silence counsel have conceded the impregnability of the principles enunciated in the *Baker* case.

The four employers asked a total of 23 specific inquiries (Appellant's Op. Br. pp. 8-9). Only one question was answered by G.E. and that one was not asked by three of the four inquirers. Counsel admit the single matter selected for reply would not help the applicant in getting the positions he sought (p. 9).

Is that an "exact supplement to the service letter"?

Is that "precisely what the inquirers wanted to know"?

Is that a "truthful and accurate answer" to the 23 subjects inquired about in a "common sense manner"? (Appellee's Br. p. 13).

They say they gave the bad along with the good. What good?

G.E. suggests Exhibit B was a "supplement" to the letter addressed to Mr. Pond. What is a supplement? Is it a straw to be grasped? Can a supplement add to an unrecognized, unidentified antecedent? Can we have a footnote without a text?

Exhibit A was addressed to Mr. Pond. Without verification, it could be no more than a "To Whom It May Concern" letter. The most incautious employer of menial domestic help would check the purported source. *A fortiori* the claim of previous employment as Chief Engineer would not be accepted without question. The most routine procedure would demand a test of the sincerity and authenticity of Exhibit A. Moreover, the very language of the inquiries proves that specific verification was desired. Otherwise, competence, ability to get along with people, jobs held, would have been needless repetition of what Exhibit A had already covered in impeccable fashion.

If "the service letter was inadequate in but one respect" (Appellee's Br. p. 12), **did three of the four employers lack the intelligence and ability to articulate their curiosity in that one respect? And why, then, did the fourth employer list ten other matters of specific interest to him? [Tr. p. 13; 1st par. 4th Cause of Action].**

An unqualified denial by G.E. of the genuineness of Exhibit A might possibly have been a more candid method of branding the document as counterfeit. Outright denial could not have been more effective. All four recipients understood the intended repudiation. *All four, in fact, refused employment to Mr. Pond by reason thereof.* The meaning derived by the reader is an element to be proved

where the libel is not *per se*. See authorities cited by appellant at pages 4 and 5 of his opening brief.

Appellee hopes that a tacit recognition of the letter of recommendation [Ex. A] is to be found in the language of Exhibit B. The grudging mention of appellant's 17 years of service is the slender thread upon which the hope is hung, only to be severed by disagreement with *the name* of the company which initially hired Mr. Pond, *the time* of his arrival in the United States and *the circumstances* of his resignation.

The circumstances of Mr. Pond's resignation are stated in Exhibit A to have been based upon Mr. Pond's "belief that his prospects with the Company were unsatisfactory." To Mr. Pond's obvious disadvantage Exhibit B slyly alters the above stated cause of his resignation to "mutual agreement."

The reason for the absence of any favorable reference in Exhibit B in contrast to the commendatory tone of Exhibit A is made crystal clear by the final sentence, a death sentence to any hopes plaintiff may have nurtured for the positions he sought.

With italics appellee says [p. 9] the statements as to ineligibility for re-engagement and the resignation by mutual agreement were not alleged to be false. Paragraph XIII [Tr. pp. 9-10] answers that contention. It embraces the tenor of the entire reply letter and alleges that the same was unjustified and that *there was nothing pertaining to plaintiff's service justifying the same, nor did defendant have any reasonable grounds to believe that plaintiff's record or qualifications were other than satisfactory.*

In dealing with the element of malice, the brief of appellee (p. 11) offers a theory that there is a distinction

between malice in the mind of the writer (allegedly not actionable) and malice as expressed in the publication. **The theory is at variance with decisions of the California Supreme Court.** In *Childers v. Mercury Printing and Pub. Co.*, 105 Cal. 284, 288, 38 Pac. 903, it is stated "malice in fact may be defined as a spiteful or rancorous disposition which causes an act to be done for mischief." The opinion continues stating that malice may be established by evidence *aliunde* or it may appear from the face of the publication itself.

The reference by counsel to *Morcom v. San Francisco Shopping News*, 4 Cal. App. 2d 284, 40 P. 2d 940, is meaningless. In that case the lower court was reversed for sustaining a demurrer where the complaint showed the existence of a conditional privilege coupled with a direct allegation of malice. The defamatory matter did not show upon its face that it could not have been published maliciously by defendant. The higher court said "it cannot be said with reason, that they (the articles complained of) carry, in themselves a refutation of the direct allegation of actual malice found in the complaint." *The Morcom case supports appellant.*

G.E. says (p. 11) that the question for the court to determine is two-fold. A more accurate statement of the first phase of the question is: Were there in the reply letters any materially false statements either in the plain context or reasonably inferred therefrom by the reader in the light of the extrinsic circumstances surrounding the writing of the letter? **A defendant is liable for what is insinuated, as well as for what is stated explicitly.** *Bates v. Campbell*, 213 Cal. 438, 2 P. 2d 383.

A correct statement of the second aspect of the two-fold question is whether malice is properly alleged. Malice

and privilege cannot co-exist. (*Brewer v. Second Baptist Church*, 32 Cal. 2d 791, 197 P. 2d 713.) Malice is inferred where malice *per se* is involved; otherwise malice must be alleged and proved. It is idle to discuss inferring malice from a document admittedly not libelous *per se*. The complaint alleges malice [Tr. pp. 7, 10; pars. X and XV] as approved in *Washer v. Bank of America*, 21 Cal. 2d 822, 831, 136 P. 2d 297.

The gist or sting of the letter sued upon is *not* as stated by appellee (Br. p. 9). The gist or sting was the negation of the authenticity of Exhibit A, the unjustified and false reflection upon appellant's loyalty, his competence, his honesty etc.

Would counsel have the Court hold that it is too heavy a burden to require the personnel department of one of the largest corporations in the United States to answer specific inquiries of the type asked by the four employers herein by giving the routine rating of "good," "average," "poor," "occasionally," or "infrequently," and to add under "remarks" or "comment" a verification, denial or photostatic reproduction of Exhibit A? The Court may take judicial notice that any other small, medium or large corporation treats such replies as a reciprocal duty owed to another as a matter of course.

Why, but intentionally and maliciously to interfere with the livelihood of a man with but 22 years of life expectancy, did appellee refuse to report the simple answers which had to be commendatory if given in line with Mr. Pond's record.

The Opinion Myth.

Does the unfounded assertion of an opinion enjoy greater latitude in the field of conditional privilege than does the assertion of any other incorrect fact? Counsel righteously stands for the freedom to express an opinion. Thus the wielder of a poison pen could take asylum behind the opaque mantle of his unfounded belief. But the law does not permit the dissemination of any fact which the publisher has no reasonable grounds to believe to be true. The statement of an opinion not founded upon any fact must have the same vulnerability as any other false statement. Restatement, Torts, Vol. 3, Secs. 599-601. Section 601 thereof under "Comment" states:

"a. Except as stated in Sec. 602, (here inapplicable) one who on a conditionally privileged occasion makes defamatory statements about another, having no reasonable grounds to believe them to be true, is not given the protection the occasion will otherwise afford if the matter turns out to be false. This is so although the publisher honestly believes the statements to be true. The negligence of the publisher in making the unqualified statements of fact without knowledge of circumstances which would lead a reasonable man to believe them to be true, is an abuse of the occasion."

In belaboring the unlikelihood of Mentzer's having first hand information of an employee in Mr. Pond's situation (p. 22) counsel begs the question. Why would personnel records be kept if such letters of inquiry required only *first hand information*? Would a personnel specialist in a company the size of G.E. ever have first hand information? Must all employees not personally known to the

personnel specialist have their service records distorted by the mischance that the specialist is not disposed to confirm or report correctly a record kept in the usual course of business? By what right did Mentzer assume that a letter addressed to International General Electric Co. (not even his employer) required the reply of a G.E. employee based on his own personal knowledge? Moreover, all of Mr. Pond's immediate superiors in appellee's affiliates were alive [Tr. p. 5]; had Mentzer been sincere in his thirst for first hand knowledge, he needed only to pick up his telephone.

Counsel Flouts Appellate Rules.

In the fourth paragraph, page 8 of its brief, appellee finds the record intolerably confining. No longer need counsel apply to the court for authority or permission to augment the record. Self-help is the order of the day for G.E. counsel. One simply throws into one's brief any extraneous matter desired. The immediate urge of one so affronted is to strike back in kind, but years of disciplined adherence to prescribed procedures for officers of the court permit only this notice.

Law Cited by Appellee.

Counsel devote nine pages of their brief (pp. 13-22) to demonstrating what was stated by appellant in his brief at the bottom of page 3 and the top of page 4, *i.e.*, *that the innuendo and the inducement are two separate things*. Innuendo cannot be any broader than the words themselves. In stating this proposition, many cases stop there with the discussion and fail to take into account that there is such a thing as inducement. This is true of all the cases selected by counsel except one, *Vedovi v. Watson & Taylor*, 104 Cal. App. 80, 285 Pac. 418. By the inducement, extrinsic facts may show that something was meant en-

tirely different from the natural import of the words. The controlling test is not as counsel contends, "what is the common meaning of the words used as they would be understood by the average person?" Under such a rule where would there be any room for a hidden or covert meaning? The inducement supplies the extrinsic facts which enable the reader to put himself into the shoes of the recipient of the defamatory matter. The inducement renders untenable the naive approach of counsel that the offending letter must be accepted at face value in its ordinary meaning. The inducement is used only where libel *per se* is not involved. It shows the reason for the unusual or hidden meaning alleged by plaintiff and so understood, in fact, by the recipient. **Decisions which use inducement and innuendo interchangeably are ill considered and do not correctly apply the principles of the law of libel.**

In *Vedovi v. Watson & Taylor*, 104 Cal. 80, 285 Pac. 418, the court says at page 85 "To constitute a libel, it is not necessary that there be a direct and specific allegation of improper conduct, as in a pleading. The charge may be either expressly stated or implied; and in the latter case the implication may be either apparent from the language used, or of such a character as to require the statement and proof of extrinsic facts (inducement, colloquium and innuendo) to show its meaning. . . . Where the words are actionable in themselves there is no occasion for inducement to be alleged, but where the words are not actionable they may be made so by inducement."

Conclusion.

Mr. Pond was not asking for reemployment by General Electric Company. He was merely seeking the opportunity in California of continuing in his chosen profession in order to support himself and his family compatibly with the station in life he had so laboriously attained after 17 years in the I.G.E. family.

The complaint states a claim. It presents a classic case for the application and enforcement of the principles of libel. Appellant should not be denied his day in court.

Respectfully submitted,

RUSSELL K. LAMBEAU,

Attorney for Appellant.

No. 15520

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

JULES POND,

Appellant,

vs.

GENERAL ELECTRIC COMPANY, a Corporation,

Appellee.

Appeal From the United States District Court for the
Southern District of California, Central Division.

APPELLEE'S BRIEF.

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FILED

AUG 21 1957

PAUL P. O'BRIEN, CLERK

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No. 15520

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

JULES POND,

Appellant,

vs.

GENERAL ELECTRIC COMPANY, a Corporation,

Appellee.

APPELLEE'S BRIEF.

Jurisdiction for Review.

This case comes up on plaintiff's appeal from judgment of the District Court [R. 28] dismissing his first amended complaint on defendant's motion under subdivision 6 of Rule 12(b), F. R. C. P. Jurisdiction of the District Court derived from diversity of citizenship, it being alleged [R. 3] and conceded that appellant is a resident and citizen of California and appellee a New York corporation. (Constitution of the United States, Art. III, Sec. 2; 28 U. S. C. A., Sec. 1332.) The amount in controversy exceeds \$3,000.00. Jurisdiction for review is conferred upon this court by 28 U. S. C. A., Secs. 1291 and 1294.

Statement of the Case.

Appellant's amended complaint is for damages for defamation. The facts as alleged in the complaint which are material to appellant's argument are in substance as follows.¹ Appellant is a qualified engineer, who for 17 years had been employed in Argentina and Asia, as well as in the United States, by International General Electric Company (I.G.E.) and foreign subsidiary corporations.² In 1950 he resigned and was given a service letter [R. 15-18, Cmplt., Ex. A]. This service letter sets out in considerable detail the jobs appellant had held with I.G.E., states that he had submitted his resignation because he believed his prospects with the Company were unsatisfactory, makes some complimentary remarks about his personality and professional ability, and closes with best wishes for his future success. Appellant further alleges that at the time it gave him this letter, I.G.E. agreed to answer inquiries about appellant and give similar letters to prospective employers in the future.

Six years later appellant applied for jobs with Elliott Engineering Company, Royal Jet, Kool-O-Tron Engineering Company, and Drayer-Hanson Incorporated, who, as prospective employers, addressed inquires about him to I.G.E. Elliott, Royal Jet, Kool-O-Tron and Drayer-Hanson had already read the service letter, as I.G.E. knew was probably the case.

¹Since the case was decided on motion to dismiss, appellee is bound to accept all the allegations of the complaint as true, but does so for present purposes only.

²I.G.E. was then a subsidiary and is now a division of appellee, General Electric Company.

In response to these four inquiries, I.G.E. wrote four identical letters. These letters are the allegedly defamatory publications of which appellant complains, and read as follows [R. 19, Cmplt., Ex. B]:

“This is in reply to your letter of March 12 in which you request information concerning Mr. Jules S. Pond.

“The official in International General Electric to whom Mr. Pond reported passed away several years ago, and I am unable to give you first-hand information concerning him. His personnel record with the Company indicates that he had approximately 17 years of service in the International General Electric family. His initial engagement was with General Electric S.A., Argentina. During the early 40's he came to the United States of his own volition, seeking opportunity for engagement here while in the process of securing naturalization as a U. S. Citizen. He was hired by International General Electric after his arrival in the United States, and was assigned to our Air Conditioning and Refrigeration Department. Our records further indicate that he submitted his resignation on August 9, 1950, which was accepted by mutual agreement.

“Insofar as I can determine from his records, we would not be prepared to consider him for re-engagement.

Very truly yours,
CHARLES MENTZER,
Specialist-Personnel.”

The following statements in these reply letters are alleged to be false [R. 6-7]:

1. The official of I.G.E. to whom appellant reported had died.

2. The writer was unable to give firsthand information concerning appellant.

No other statements in the reply letters are alleged to be false.

The complaint alleges that the reply letters were worded as they were by reason of the malice and ill will of certain I.G.E. employees toward appellant [R. 7].

By way of innuendo, the complaint [R. 8-9] alleges in substance that by the reply letters the four prospective employers were given the impression that the service letter might not be authentic or correct, that I.G.E.'s files contained much information unfavorable to appellant, and that I.G.E. could not truthfully or conscientiously give appellant a favorable report or recommendation. All this is alleged to have been the understanding of the recipients by reason of certain omissions and statements in the reply letters. Appellant contends on the one hand that I.G.E. should have repeated the detailed information contained in the service letter, should have responded specifically to inquiries about his ability and personal characteristics, and should have included favorable statements allegedly indicated by his record. On the other hand, appellant contends that the reply letters should not have disclaimed personal knowledge on the part of the writer, and should not have stated that appellant would not be considered for re-engagement (although the statement is not alleged to have been false).

As extrinsic facts to support the defamatory meaning pleaded in the innuendo, the complaint alleges:

1. The information concerning appellant in the reply letters was of little or no interest to prospective employers [R. 8].

2. Appellant's service with I.G.E. had been entirely satisfactory [R. 9].

3. Appellant was an exceptionally competent engineer [R. 10].

The complaint has four causes of action, one for each of the four reply letters addressed to prospective employers. As to each cause of action, it concludes by alleging that appellant did not get the job, was injured in his reputation and hurt in his feelings. On each count, appellant asked \$75,000.00 for loss of salary, \$300,000.00 for his hurt feelings and injured reputation, \$300,000.00 as punitive damages. and \$500,000.00 for prospective damages.

Appellee moved to dismiss the complaint on the ground that no claim in libel was stated because the reply letters were privileged communications which were unambiguous and incapable of defamatory meaning [R. 21]. On the motion, the court had before it [R. 25-27] the inquiry made of I.G.E.'s personnel department by Walter Kidde & Company, Inc., and its reply thereto, alleged in paragraph IX of the complaint [R. 7] to have served as a model for the letters which are the subject of this action.

The motion to dismiss was granted. Appellant having declined to amend further, judgment of dismissal was entered on February 28, 1957 [R. 28], the court finding that the reply letters were not defamatory or susceptible of the meaning attributed to them. Notice of appeal was filed on March 7, 1957 [R. 31].

Relevant Statutes.

California Civil Code, Section 44:

“§44. *Defamation, what.* Defamation is affected (effected) by:

1. Libel;
2. Slander.”

California Civil Code, Section 45:

“§45. *Libel, what is.* Libel is a false and unprivileged publication by writing, printing, picture, effigy, or other fixed representation to the eye, which exposes any person to hatred, contempt, ridicule, or obloquy, or which causes him to be shunned or avoided, or which has a tendency to injure him in his occupation.”

California Civil Code, Section 45a:

“§45a. (*Libel on its face: Definition: Defamatory language not libelous on its face, when actionable.*) A libel which is defamatory of the plaintiff without the necessity of explanatory matter, such as an inducement, innuendo or other extrinsic fact, is said to be a libel on its face. Defamatory language not libelous on its face is not actionable unless the plaintiff alleges and proves that he has suffered special damage as a proximate result thereof. Special damage is defined in Section 48a of this code.”

California Civil Code, Section 47:

“§47. (*Privileged publication or broadcast: What constitutes.*) A privileged publication or broadcast is one made—

* * * * *

3. In a communication, without malice, to a person interested therein, (1) by one who is also in-

terested, or (2) by one who stands in such relation to the person interested as to afford a reasonable ground for supposing the motive for the communication innocent, or (3) who is requested by the person interested to give the information.”

* * * * *

California Civil Code, Section 48:

“§48. (Same: When malice not inferred.) In the case provided for in subdivision 3 of the preceding section, malice is not inferred from the communication.”

Issues.

Appellant declined the opportunity to further amend his complaint. The only issue on this appeal is whether or not the reply letters are capable of defamatory meaning when construed in the light of the extrinsic facts alleged in the amended complaint. If they are not so capable, the action was properly dismissed.

Appellee’s position has been incorrectly stated by appellant (Op. Br. p. 2). We have never contended that extrinsic facts may not be alleged to support a pleaded innuendo. We contended in the trial court, and contend now, that the reply letters are not reasonably susceptible of the defamatory meaning attributed to them so as to be the foundation of an action for libel, and that the extrinsic facts alleged in support of the innuendo do not change the ordinary, unambiguous and non-defamatory meaning of the language employed. We further contend that the letters are privileged communications and are communications without malice as that term is defined in the statutes and decisions.

ARGUMENT.

It is apparent from reading the complaint that appellant complains not so much of what I.G.E. said, as of what it did not say. The whole burden of the complaint is that I.G.E. should have said something good about appellant and given him a favorable recommendation, and because it did not its silence was defamatory.

Either a publication is defamatory or it is not. If it is not defamatory it cannot be made so by contract, and does not become so merely because there may have been an agreement to say something different. The standard is objective, not that agreed upon by the parties.

We may accordingly dismiss from consideration I.G.E.'s alleged agreement to reproduce the service letter and give appellant a favorable recommendation, and its alleged obligation to respond to specific inquiries. Whatever other consequences may flow from these alleged breaches of duty, they cannot make an innocent publication defamatory.

It should be noted that appellant has filed another separate and distinct action on the same facts, in which he attempted to state a cause of action for breach of contract and a cause of action for negligence.³ On this appeal he must stand or fall on the theory of libel.

Silence cannot be defamatory, since by definition libel requires a publication. The proposition is so obvious that it appears only once to have received judicial consideration. (*New York, Chicago & St. Louis Railroad Co. v. Schaffer*, 65 Ohio St. 414, 423, 62 N. E. 1036, 1039 (1902).)

³*Pond v. General Electric Company*, No. 19870-BH, Civil, United States District Court, Southern District of California.

The fact is that the allegedly false statements in the reply letters were not injurious or defamatory, and the injurious statements were not false. The gist or sting of the reply letters was that appellant's resignation had been submitted and accepted by mutual agreement, and that he would not be considered for re-engagement. These statements might well not be helpful to appellant in obtaining employment, but *they were true statements and are not alleged to be false*. The allegedly false statements (that the official to whom he had reported was dead and the writer could not give firsthand information) could not possibly be defamatory of appellant.

The complaint shows on its face that the occasion was conditionally privileged. The reply letters were written in answer to inquiries about appellant from prospective employers. They were a proper response to the inquiries received and suitably supplemented the service letter, which any reasonable person would assume prospective employers would already have and which in fact they did have. The allegedly false statements, if they have materiality at all, negate any inference of malice, for as appellant himself pleads [R. 8] they serve at most to give the impression that I.G.E. could have been specific in support of the unfavorable opinion it expressed, but preferred not to be.

Appellant's case cannot rise above the reply letters. It was the function and duty of the trial judge to determine in the context of the facts alleged if the letters were reasonably susceptible of the defamatory meaning and malice attributed to them by the pleader's innuendo. If they were not, it was the duty of the court to dismiss the action.

I.

The Reply Letters Were Conditionally Privileged as in Response to Inquiries About a Former Employee by Prospective Employers. They Were Within the Privilege as a Proper Response and a Suitable Supplement to the Service Letter. They Do Not Permit an Inference or Finding of Malice, and Even if They Did, They Would Still Be Privileged Because All Material Statements Were True.

There is no dispute that the libel law of California governs in this case. (30 Cal. Jur. 2d 684.) Appellant resides in California, and all four reply letters were addressed to prospective employers in California.

As applied to this case, Section 45 of the California Civil Code defines libel as a false and unprivileged publication tending to injure appellant in his occupation. Under the third clause of Subdivision 3 of Section 47 of the Civil Code, the reply letters would be clearly privileged if without malice, even though they contained false statements that tended to injure appellant in his occupation.

If an allegedly injurious publication is true, malice cannot make it libelous, no matter how injurious it may be. Likewise, if an allegedly false publication is not injurious, it is not libelous, no matter how false it is or what degree of malice inspired it.

False statements regarding immaterial matters cannot be the foundation of a libel action, and must be disregarded if the sting or gist of the publication is justified. (30 Cal. Jur. 2d 765-767; *Emde v. San Joaquin Labor Council*, 23 Cal. 2d 146, 160, 143 P. 2d 20, 28 (1943).)

The question for this court to determine is accordingly two-fold. Were there in the reply letters any false statements of material matters tending to injure appellant in his occupation? If there were, were the letters malicious so as to be outside the privilege? The inquiry will be expedited by considering the second question first.

In determining whether the reply letters were malicious, inquiry is directed primarily not to the state of mind of the writer, but to the letters themselves. Malice in the law of civil libel is irrelevant except as affecting privilege, and then refers not to ill will as an abstraction existing in the writer's mind as a sort of disembodied presence, but to applied malice, ill will as expressed in a publication. (Civil Code, Sec. 45.) Section 47 of the Civil Code refers not to a communication *written* without malice, but to a *communication* without malice. Everyone has the right to express a bad opinion in a privileged situation. (*Taylor v. Lewis*, 132 Cal. App. 381, 386, 22 P. 2d 569, 571 (1933).) Malice is not inferred from the mere fact of such a communication. (Civil Code, Sec. 48.) It may, however, be evidenced by the tenor of the communication, when it is inherent in the language employed and is apparent from reading it. (*Brewer v. Second Baptist Church*, 32 Cal. 2d 791, 799, 197 P. 2d 713, 718-719 (1948).) Conversely, when the tenor and character of the language employed in the publication are themselves inconsistent with malice, allegations that the communication was motivated by malice and ill will are of no avail to the pleader in stating a cause of action. (*Morcom v. San Francisco Shopping News*, 4 Cal. App. 2d 284, 290, 40 P. 2d 940, 942 (1935).)

Let us now look at the facts leading to the publication of the reply letters. The four companies which addressed

inquiries to I.G.E. already had the service letter. I.G.E. knew they probably had the service letter. (We would say that the alleged probability was a virtual certainty.)

I.G.E. did not copy out the service letter all over again. We submit there is no malice in that. (In fact, reference to the inquiry from Walter Kidde and Company and the response thereto [R. 26-27], alleged in the complaint [R. 7] to have been the model for the reply letters, indicates that repetition of the service letter was not what was wanted at all.) I.G.E.'s personnel specialist did what any intelligent person would have done. He did not repeat the service letter—he supplemented it.

The service letter was inadequate in but one respect. The statement that appellant had submitted his resignation based on his belief that his prospects with the Company were unfavorable would raise a question in the mind of any prospective employer. Why had he resigned? After 17 years of employment, there must have been a reason why his future prospects were unfavorable. His experience record indicated that he was technically competent. Was there no room at the top, or was there something about appellant that disqualified him from advancement in the opinion of I.G.E.? One more item of information would resolve the doubt. Would I.G.E. consider appellant for re-employment?

In this context, there is nothing wrong with the reply letters. They explain that appellant's resignation had been submitted and accepted by mutual agreement, and that he would not be considered for re-engagement. These statements were true, and I.G.E. was entitled to make them in response to proper inquiry.

The reply letters exactly supplement the service letter. They fill in the gaps and tell a prospective employer who already had the service letter precisely what he would want to know. The false immaterial statements, if they have any significance at all, signify only that I.G.E. was expressing its opinion but would prefer not to be specific as to its reasons.

Nothing would be gained by an inquiry into the minds of I.G.E.'s employees to determine if they harbored ill will toward appellant. The occasion for the reply letters was clearly privileged. They were written within the scope of the privilege and in all material respects truthfully and accurately answered the inquiries made in a common-sense manner. They permit no inference of malice.

II.

It Is the Duty of the Trial Court to Determine Whether a Publication Is Capable of Defamatory Meaning. Since the Reply Letters Were Phrased in Ordinary, Clear and Unambiguous Language, and Were Not Reasonably Susceptible of the Defamatory Meaning and Malice Attributed to Them by the Innuendo, It Was the Duty of the Court to Dismiss the Action.

As we have had occasion to remark, whether the reply letters were defamatory does not depend on the agreement of the parties as to what should or should not have been said. Neither does it depend on the meaning attributed to them by appellant or allegedly attributed to them by the recipients of the letters. The standard by which the reply letters are to be measured is objective and impersonal. It is well settled that the meaning that controls is the common meaning of the words used as they would be understood by the average person.

30 Cal. Jur. 2d 723-724:

“Where the allegedly defamatory language is in the vernacular of the place of publication, it will be assumed that those who heard or read it understood it in the sense which properly belongs to it. Under such circumstances, the common import of the words must be applied to test its defamatory character. There is no room, in such a case, for the introduction of evidence of witnesses as to their understanding of the language.”

3 Restatement of Torts, Sec. 559, Comment (e);
53 C. J. S. 47-48.

It was the duty of the trial judge to determine whether the language of the communications alleged to be false and defamatory is reasonably capable of the defamatory meaning attributed to it by the innuendo. If the court finds that the publication is not reasonably capable of defamatory meaning in the light of the circumstances alleged, there is no question for the jury and the case should be dismissed.

Mellen v. Times-Mirror, 167 Cal. 587, 593, 140 Pac. 277, 279 (1914):

“It cannot be disputed that it is for the court to determine whether, in the light of such extrinsic facts as are alleged, the writing can be a libel. If, in the light of such extrinsic facts, the article is not fairly susceptible of the defamatory meaning sought to be attributed to it, the complaint fails to state a cause of action. Of course, if the language of the article is capable of two meanings, one of which is harmless and the other libelous, and it is alleged that the same was used and understood as conveying the latter meaning, a cause of action is stated, and it is the province of the jury to determine in which

sense the language was used and understood by the readers of the article. But it is for the judge to determine whether the language used is capable of the defamatory meaning claimed for it by the plaintiff. (See *Van Vactor v. Walkup*, 46 Cal. 124, 133.)”

31 Cal. Jur. 2d 57;

3 Restatement of Torts, Sec. 614.

It is well settled that if a communication is phrased in ordinary language and is clear and unambiguous, its meaning may not be changed or enlarged by innuendo to include a defamatory meaning which the words do not naturally bear.

31 Cal. Jur. 2d 54:

“It is not in the nature of an innuendo to beget an action, nor is that its purpose. Unless the words used can reasonably be understood in a defamatory sense, the innuendo cannot aid the pleader. Nor can an innuendo be used to give the words charged as defamatory an unnatural or forced meaning. It cannot ascribe to defamatory matter a meaning broader than the words actually used naturally bear, or broader than they bear when read in the light of the inducement. In other words, an innuendo cannot add to, enlarge, extend, or change the natural sense of the published words.”

Of the many decisions which could be cited in support of the foregoing propositions, we will mention only those most relevant on their facts. The decisions briefly stated hereinafter make it clear that the courts have consistently declined to enlarge or alter the natural and ordinary meaning of words in the manner contended for by appellant here.

Lorentz v. R.K.O. Radio Pictures, 155 F. 2d 84, 87 (9th Cir., 1946). The statement had been published about a discharged movie producer that he had exceeded his budget, and that defendant hoped that he could be persuaded to return and finish the picture on a reduced budget. Plaintiff had alleged that the publication was intended to mean that he was incompetent and insubordinate. This court declined to enlarge the words used beyond their natural meaning, and affirmed the trial court's order dismissing the cause of action. The facts appear from the opinion, which is worthy of extended quotation:

“It is charged that the following statements made by the corporation about the time the corporation discharged the appellant concerning the appellant are false and by innuendo defame him: ‘That there had already been expended in the production of the first Picture, prior to the time the Corporation ordered the plaintiff to stop production of said Picture approximately \$400,000.00; that a total of \$400,000.00 was all that was allotted for the entire production of said Picture; that an additional \$400,000.00 would be required to complete said Picture; and that the Corporation hoped that plaintiff would be persuaded to return and finish said Picture on a reduced budget.’

“The statements, as held by the trial court, are not reasonably susceptible of meaning, nor is their fair or reasonable import that appellant was incompetent in his work. or that he was unwilling to cooperate or unmindful of the corporation's desire to do business at a profit, or that he refused to cooperate to reduce costs. The appellant sought to attach such meanings by innuendo, but the trial court did not err in holding that such inferences could not fairly be drawn from the statements.

“An explanation in regard to stoppage of production was not unreasonable, and it is far more reasonable to infer from the explanation made that the corporation had expected the picture to be produced for \$400,000 but instead another \$400,000 would probably be necessary, and the corporation hoped appellant would return and that a means would be devised to lessen the cost. In no way is any fault or blame attributed to the appellant.

“The appellant seeks to attach a meaning beyond the fair and reasonable import of the language used. Ordinarily, an innuendo may not lend a meaning to allegedly defamatory matter different than or broader than the words themselves naturally hold, that is, it cannot add to, enlarge, or change the natural sense of the published words. See *Emde v. San Joaquin, Etc., Council*, 1943, 23 Cal. 2d 146, 159, 143 P. 2d 20, 150 A. L. R. 916; *Bates v. Campbell*, 1931, 213 Cal. 438, 442, 443, 2 P. 2d 383; *Chavez v. Times-Mirror Co.*, 1921, 185 Cal. 20, 25, 195 P. 666. Nor may the innuendo be used to give the words an unnatural or forced meaning. See *Maas v. National Casualty Co.*, 4 Cir., 1938, 97 F. 2d 247; *Phillips v. Union Indemnity Co.*, 4 Cir., 1928, 28 F. 2d 701. The court in seeking to determine the possible meaning of the published language in the light of extrinsic facts must look to see if the words are reasonably susceptible of or whether they reasonably could be understood to have the defamatory meaning suggested by the innuendo. See *Bates v. Campbell*, *supra*; *Chavez v. Times-Mirror Co.*, *supra*; *Jackson v. Underwriters' Report, Inc.*, 1937, 21 Cal. App. 2d 591, 69 P. 2d 878. The possible inference that appellant might be unwilling to return at a reduced budget is not defamatory and would not suggest insubordination.

“It has been said that ‘In determining whether the words are capable of defamatory meaning the Judge will construe them according to the fair and natural meaning which will be given them by reasonable persons of ordinary intelligence, and will not consider what persons setting themselves to work to deduce some unusual meaning might extract from them,’ Gately, Libel and Slander, 3rd Ed., 1938; and that ‘In determining whether the alleged defamatory matter is libelous per se it is the duty of the court to give the language used the natural and popular construction of the average reader, not the critical analysis of a mind trained in technicalities. Sullivan v. Warner Bros. Theatres, Inc., 1941, 42 Cal. App. 2d 660, 662, 109 P. 2d 760, 762. See Western Broadcast Co. v. Times-Mirror Co., 1936, 14 Cal. App. 2d 120, 57 P. 2d 977; Phillips v. Union Indemnity Co., 4 Cir., 1928, 28 F. 2d 701, 702.”

Bates v. Campbell, 213 Cal. 438, 442-443, 2 P. 2d 383, 385 (1931). Here the court declined to construe a general reference to a discharged employee’s record as implying unfitness for the position held. Omitting citations, the California Supreme Court’s opinion on this point reads:

“Should the alleged libelous publication be ambiguous and susceptible of two meanings, one of them harmless and the other injurious, it is necessary for the plaintiff to plead by innuendo the facts upon which he relies to point out the injurious meaning of the writing. * * * However, it is not the purpose of an innuendo to ‘beget an action,’ and the meaning of the language complained of may not be enlarged or extended thereby. * * * In other words, it is the office of the innuendo to merely explain or interpret, without enlarging, the alleged libelous publication.

“Viewing the alleged libelous communication in the light of these well-established principles of law, we are of opinion that there is merit in respondent’s contention that the innuendo contained in the complaint attempts, in some particulars at least, to enlarge and extend beyond its fair and reasonable import the meaning of certain of the statements published of and concerning the appellant. To illustrate: The statement in the letter that ‘It would probably serve no useful purpose to recite the circumstances leading to the request for Miss Bates’ resignation which in pursuance to such request, was received and accepted by the Board of Trustees on or about July 7, 1927,’ may not be construed, as in the complaint here, to mean that ‘plaintiff was discharged by the Board of Trustees of the Los Angeles Bar Association for the reason that she was not a fit person to occupy such position.’ The statement quoted from the letter makes no reference whatever, either expressly or impliedly, to appellant’s fitness or unfitness to occupy such position, and is not therefore reasonably open to the construction attempted to be placed on it. * * *”

Pollard v. Forest Lawn, 15 Cal. App. 2d 77, 81, 59 P. 2d 203, 205 (1936). Pollard was an attorney who filed a libel action on account of the publication of the affidavit of a plaintiff for whom he had been attorney of record in a suit against Forest Lawn. The affidavit stated, in substance, that the affiant had had nothing against Forest Lawn but had been taken to Pollard by certain funeral directors who promised to pay her for the use of her name, and that Pollard and the others told her when she signed the papers that it would cost her nothing and she would probably not have to testify. It was alleged in the innuendo that the publication con-

veyed the meaning that Pollard had filed a suit without authorization, had taken advantage of his client, and had been a party to a conspiracy against Forest Lawn. The District Court of Appeal held that the language of the publication was not reasonably susceptible to any such meaning, and affirmed the judgment of dismissal on demurrer to the complaint, saying, in part (omitting citations):

“As to the first question it is the duty of the trial court to determine whether the language used in the alleged libelous publication is capable of the defamatory meaning claimed for it by the plaintiff * * * and the innuendo cannot ascribe a meaning to the defamatory matter other or broader than the words themselves naturally bear. It cannot add to nor enlarge nor change the sense of the published words.
* * *”

* * * * *

“In view of the only reasonable interpretation which can be placed upon the publication, it is readily seen that it does not support the libelous innuendoes alleged by plaintiff, and the trial court properly sustained the demurrer.”

In *Emde v. San Joaquin Labor Council*, 23 Cal. 2d 146, 159, 143 P. 2d 20, 28 (1943), the California Supreme Court held that the statement that a dairy had violated its union contract did not permit the innuendo that the dairy was dishonest.

In *Chaves v. Times-Mirror*, 185 Cal. 20, 25, 195 Pac. 666, 669 (1921), the California Supreme Court held that the statement that a certain instance called for investigation by the State Bar Association was not

capable of meaning that the attorney in question was unprofessional or corrupt.

In *Vedovi v. Watson & Taylor*, 104 Cal. App. 80, 87, 285 Pac. 418, 422 (1930), the District Court of Appeal held that a notice cancelling an insurance policy for nonpayment of premium was incapable of meaning that the premium had been misappropriated by the agent who allegedly had collected it:

“* * * Applying a liberal construction (*Ingraham v. Lyon*, 105 Cal. 254 (38 Pac. 892)), the most that appears from the notice, viewed in the light of the extrinsic facts alleged, is that plaintiff collected the premium from his client and that the Provident Fire Insurance Company or defendant as its agent failed to receive it. There is nothing, either directly or inferentially, to show that plaintiff was entrusted with the premium or fraudulently appropriated it. In short, no words are used in the notice which, even if construed by aid of the extrinsic facts, remotely charge embezzlement.

“But, in the innuendo, the complaint alleges that defendant, by the notice, meant to charge plaintiff with that crime, and was so understood by the Western States Life Insurance Company. As the words in the notice are not actionable *per se*, the innuendo may only interpret their meaning but cannot introduce a meaning broader than the words naturally bear in view of the facts alleged in the inducement. (*Grand v. Dreyfus*, 122 Cal. 58 (54 Pac. 389).) Where the words can bear but one meaning and that is obviously not defamatory, no innuendo can make the words defamatory. * * *”

In *Hearne v. De Young*, 119 Cal. 670, 678, 52 Pac. 150, 153 (1898), the publication of a newspaper article

referring to a murder, and stating that the plaintiff had been the family doctor and one of the first to arrive on the scene, was held not to permit the innuendo that the plaintiff was implicated in the murder.

The foregoing authorities illustrate the reluctance of the courts in libel suits to extend the meaning of words beyond that which they ordinarily convey. The authorities clearly show that a cause of action for libel cannot be made out by the drawing of any such inferences as the appellant seeks to draw from the reply letters in the case at bar.

The reply letters could not possibly have the meaning which they allegedly were intended to convey. The reference to appellant's record of 17 years of service tends to confirm rather than to impeach the service letter. The statements that the official in I.G.E. to whom appellant reported had died and that the writer had no first hand information, although allegedly false, are incapable of the sinister meaning attributed to them by appellant. It is readily understandable that a personnel specialist in New York in 1956 would have no first hand information about a former employee, most of whose service had been in South America and Asia many years before.

The only statements that could possibly have been injurious to appellant were the statements that according to the records appellant had submitted his resignation by mutual agreement and would not be considered for re-engagement. These statements are not alleged to be false. They must therefore be considered to be fair comment on his record and an honest expression of I.G.E.'s opinion, an opinion which I.G.E. was certainly entitled to express in response to inquiry from prospective employers.

A former employer's opinion is a fact in which any prospective employer is interested. That would be especially so in this case, where the essential details of appellant's employment record were already made known by the service letter. In fact, almost all of the specific inquiries addressed to I.G.E. were about matters of judgment or opinion. The expression of an unfavorable opinion and recommendation (assuming that the letters were such) does not, however, necessarily or even permissibly reflect adversely on appellant's competence or professional qualifications. Indeed, the statement of his record of 17 years of service compels the inference that he was technically qualified for the positions he had held. The mere fact that I.G.E. would not rehire him does not necessarily imply that he was either personally or professionally disqualified for employment elsewhere. It is well known that a man who for some reason or for no tangible reason does not fit into one company may and often does become a successful member of another organization.

Putting (for the purpose of argument) the worst possible construction on the admittedly true and correct statement that appellant's resignation had been submitted and accepted by mutual agreement, it appears that the concluding statement, far from being a "knockout punch" (Op. Br. p. 10), does no more than state the obvious. It goes without saying that an employee whose resignation has been submitted and accepted by mutual agreement would not likely be considered for re-engagement.

The burden of appellant's argument is that I.G.E. should have expressed a favorable opinion of appellant in certain respects, and should have restated the service letter. The argument ignores the fact that this is a libel

suit. For the purposes of this action, I.G.E. was under no affirmative duty whatsoever. Its only obligation was negative—to refrain from defamatory statements that were both false and malicious. I.G.E. was not required to say nothing but good about appellant, nor to refrain from saying anything bad about him. It was permitted to respond to inquiries, as is indicated by the statutory privilege conferred by California Civil Code, Section 47(3).

Once it is accepted that this is a libel suit, appellant's arguments are seen to be quite beside the point. It is axiomatic that everyone is entitled to his own opinion. I.G.E. stated its opinion of appellant. Under the admissions of the complaint, its statements were no more than a fair comment on appellant's record taken as a whole, the bad along with the good. The allegedly defamatory statements in the reply letters were not false and were not malicious. The allegedly false statements could not be defamatory of appellant by any stretch of the imagination. The reply letters were privileged communications, and are incapable of defamatory meaning in the light of the facts alleged in the amended complaint.

Conclusion.

On the face of the amended complaint, the reply letters are privileged communications devoid of any material false statement injurious to appellant. Appellant in fact complains of the letters only because of what he thinks they should have said but do not say. Their tenor negatives any inference of malice. They are written in ordinary, unambiguous language incapable of being understood in the defamatory sense attributed to it by the innuendo. The extrinsic facts alleged in no way alter

their character as reasonable and proper communications which appellee was privileged to publish in response to inquiries received from prospective employers. No claim in libel having been stated by the amended complaint, the judgment of the trial court dismissing the action should be affirmed.

Respectfully submitted,

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No. 15520

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

JULES POND,

Appellant,

vs.

GENERAL ELECTRIC COMPANY, a corporation,

Appellee.

BRIEF OF APPELLANT.

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FILED

JUL 23 1957

FEDERAL BUREAU OF INVESTIGATION

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JULES POND,

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BRIEF OF APPELLANT.

Jurisdiction.

This court has jurisdiction of this appeal by reason of 28 U. S. C. Section 1291 which provides that Courts of Appeal have jurisdiction of appeals from all final decisions of the District Courts of the United States except where a direct review may be had in the Supreme Court.

This is an appeal from a judgment of dismissal of a complaint for damages for defamation. Such a judgment is appealable. (*Wright v. Gibson* (C. C. A. 9, Cal. 1942), 128 F. 2d 865; *Asher v. Rupp* (C. C. A. 7, 1949), 173 F. 2d 10.) The District Court had jurisdiction by reason of the amount in controversy being over \$3,000 and diversity of citizenship. [Tr. 3, 14.]

This is not a case appealable directly to the United States Supreme Court.

Specification of Error.

Dismissal of the action for alleged failure of the complaint to state facts constituting a cause of action or claim for relief was error.

Statement of the Case.

The question presented is whether a defamatory letter not libelous *per se* is actionable under the facts and circumstances detailed in the complaint.

ARGUMENT.

The appellee successfully urged in the trial court that a writing must be interpreted within its four corners and that unless the libel can be seen upon the face of the document no action can be maintained upon such writing.

Such never has been the law and the trend of the law today is away from archaic forms of pleadings in defamation actions which so frequently in the past resulted in "justice being smothered in her own robes." (*Harris v. Zarone*, 93 Cal. 59, 28 Pac. 845.)

The writing complained of is to be found in the Transcript of Record, page 19. It is a letter written by appellee to each of four prospective employers of appellant under the circumstances alleged in four separate causes of action. Each cause of action pertains to one of the prospective employers.

I.

Extrinsic Facts and Circumstances May Properly Be Pleaded and Proved.

That extrinsic facts and circumstances may be used to show the actual meaning of an otherwise harmless appearing document see *Baker v. Warner*, 231 U. S. 588, 594, 34 S. Ct. 175, 58 L. Ed. 384 where the Supreme Court said

“But there is a middle ground where though the words are not libelous per se, yet, in the light of the extrinsic facts averred, they are susceptible of being construed as having a defamatory meaning. Whether they have such import is a question of fact. In that class of cases the jury must not only determine the existence of the extrinsic circumstances, which it is alleged bring to light the concealed meaning, but they must also determine whether those facts when coupled with the words, make the publication libelous. *Van Vechten v. Hopkins*, 5 Johns. 219.”

To the same effect see *Erick Bowman Rem. Co. v. Jensen Salsbery Lab.* (C. C. A. 8, Minn. 1926), 17 F. 2d 255, 258, 52 A. L. R. 1187.

The Supreme Court of California is of the same view (*Ervin v. Record Publishing Co.*, 154 Cal. 79, 81, 97 Pac. 21; *Maynard v. Firemans Fund*, 34 Cal. 48 and 47 Cal. 207).

Confusion often arises from the statements of some courts that it is not the purpose of an innuendo to “beget an action”, or that the meaning of language complained of cannot be enlarged or extended by the innuendo.

(*Lorentz v. R.K.O.*, 155 F. 2d 84, 87; *Bates v. Campbell*, 213 Cal. 438, 2 P. 2d 383; *Mellen v. Times-Mirror*, 167 Cal. 587, 140 Pac. 277.) In applying these rules the office of the inducement must not be forgotten. Where libel *per se* is not involved, explanation of what was *meant* by what was *said* may be shown by the inducement together with the innuendo.

In *Erick Bowman Rem. Co. v. Jensen Salsbery Lab.* (C. C. A. 8, Minn. 1926), 17 F. 2d 255, the court said at page 258,

“Where words are not actionable *per se*, it is necessary to plead by way of inducement such extrinsic facts as will render the words actionable and to connect such extrinsic facts by proper colloquium with the particular words. (citing cases including *Baker v. Warner*, *supra*). The office of the inducement is to narrate the extrinsic circumstances which, coupled with the language published, affect its construction, and render it actionable, where, standing alone and thus not explained, the language would appear either not to concern the plaintiff, or, if concerning him, not to affect him injuriously. This being the office of the inducement, it follows that if the language does not naturally and *per se* refer to the plaintiff, nor convey the meaning the plaintiff contends for, or if it is ambiguous and equivocal, and requires explanation by some extrinsic matters to show its relation to the plaintiff, making it actionable, the complaint must allege by way of inducement, the existence of such extraneous matter.”

Prosser on Torts (2nd Ed.), p. 582;

Harper & James, *The Law of Torts* (1956), Secs. 5.4, 5.5, 5.6, 5.27;

3 Restatement of the Law of Torts, Sec. 563.

are to the same effect.

In an article in 12 Southern California Law Review by Hall entitled "Pleading in Libel Actions in California" at page 231 the following appears

". . . When the words used are capable of two meanings, one defamatory and one innocent, the plaintiff frequently must plead not only (by way of innuendo) that the words were used and understood in the defamatory sense, but also (by way of inducement) circumstances indicating that the words were understood in the defamatory sense. Events antedating the publication frequently must be pleaded to support the innuendo, e.g., to show the situation or information of the readers of the words was such that they derived the defamatory meaning from them.¹ Without pleading such inducement, the mere selection and statement by plaintiff of an innuendo may be entirely insufficient. Thus it has been declared again and again that an innuendo may not introduce a meaning broader than the words naturally bear, or introduce new matter, or enlarge the natural meaning of words. Therefore, unless the plaintiff supports his innuendo by the pleading of an inducement, he runs the risk of having the innuendo stricken on the ground that the words used are incapable of the innuendo which he has selected. If, on the other hand, the plaintiff has pleaded an inducement showing that those in the situation of the readers of the words reasonably would have understood them in the defamatory sense selected by the innuendo will stand."

¹(from Townshend on Slander and Libel §§ 308 & 335)

"It is the office of the inducement to set forth the extrinsic circumstances which, coupled with the language uttered, affects its construction and makes it actionable, where standing alone the language used would appear not to affect the plaintiff injuriously. . . . It has been frequently held that the inducement is necessary where the language does not naturally per se convey the meaning which the plaintiff would attribute to it."

II.

Extrinsic Facts.

Plaintiff had represented [Tr. 15-18, 5] to his prospective employer in each of the four instances involved in the complaint the facts pertaining to his 17 years of employment by General Electric affiliates as follows:

That plaintiff was:

Chief Engineer, Air Conditioning and Commercial Refrigeration Division, International General Electric Company, New York Office from Dec. 10, 1945 to Aug. 22, 1949 and that his duties included: training engineers for foreign field; supervision of quotations for special jobs; collaboration with G.E. factories in design adaptations for export; and issue of commercial engineering circular letters for I.G.E. distribution network; including personally conducted market survey of South and Southeast Asia and the Far East during the nine month round-the-world 1948-49 tour of duty.

Manager, Installation and Service Department, General Electric, S. A. Argentina, Feb. 1, 1942 to Oct. 31, 1945, and that his duties under that assignment included: supervision of erection, shop repair and field service of all G.E. installations (steam electric power plants, refrigeration and air conditioning, appliances, electronics, etc.) and electro-mechanical maintenance of G.E.S.A. office and factory building.

Air Conditioning Engineer, G.E.S.A. Buenos Aires, Argentina, March 1, 1937 to Feb. 1, 1942, and that his duties under that assignment included: sales of industrial process and comfort central plant

installations; contracting; personnel training; institutional work with power and light companies.

Refrigeration Engineer, General Electric S.A. Buenos Aires, Argentina, Sept. 1, 1934 to March 1, 1937, and that his duties under that assignment included: organization of service shops for power and light companies in inland provinces and training of technical personnel; sales of food conservation and industrial jobs; local manufacturing of fixtures and parts; and letting of contracts for related materials and labor.

Application Engineer, General Electric Appliances, S.A., Buenos Aires, Argentina, November 13, 1933, to September 1, 1934, and that his duties under that assignment included: training of sales crews, estimates, designs and preparation of service manuals.

Special Representative of International General Electric Company in Thailand, August 22, 1949, to August 24, 1950, for the purposes of negotiation of acceptance of International General Electric project on Hydro-electric Development by Siamese Government and assistance to distributor related to bids on Diesel Electric Locomotives for State Railways and on Steam Turbine Generating Sets for the Power Authority.

And plaintiff had also represented:

That while plaintiff was Chief Engineer he had shown ability to arouse enthusiasm and personal loyalty of his subordinates; that plaintiff was helpful in closing orders for refrigeration and air conditioning equipment.

That plaintiff's employer had always had a high opinion of plaintiff's engineering ability.

That according to reports to his employer on his Siamese assignment he had assisted the distributor in every way and that he was well liked not only by the members of the distributor's organization, but by the Siamese people in general.

That plaintiff had 17 years of service in the International General Electric organization. [Tr. 15-18; 5.]

All of said facts were true and were known by appellee to be true. [Tr. 5; ¶ IV.]

The inquirer had made specific inquiries of defendant as to:

First Cause of Action

plaintiff's honesty, loyalty, competency, responsibility, ability to get along with people, desirability as security risk, any other comments as to plaintiff's ability and character. [Tr. 4.]

Second Cause of Action

plaintiff's competence, trustworthiness, ability to get along with other people. [Tr. 11.]

Third Cause of Action

plaintiff's qualifications in regard to his character, sales ability and integrity and other characteristics. [Tr. 12; ¶ IV.]

Fourth Cause of Action

length of time plaintiff had been employed; job or jobs held; when and why employment was terminated; whether the employee would be eligible for

rehiring; whether the employee would be considered a good security risk; whether the employer considered plaintiff (a) superior; (b) above average; (c) average; (d) below average; or (e) poor as to: co-operation, reliability, capacity to progress, responsibility, honesty. The inquirer also requested "remarks." [Tr. 13-14; ¶ I.]

The letter of inquiry pertaining to causes of action I, II, and III did not ask whether plaintiff would be eligible for rehiring.

III.

The Offending Letter Viewed in the Light of the Extrinsic Facts.

Of all the facts known to appellees, including those recited in Exhibit A [Tr. 15-18], appellant's former employer would confirm only the following:

- (a) that appellant had 17 years service in the International General Electric family;
- (b) that appellant was hired by I. G. E. after his arrival in the United States, and was assigned to their Air Conditioning and Refrigeration Department; and
- (c) that appellant submitted his resignation August, 1950.

The writer of the reply letter, while professing lack of "first hand information" concerning appellant, discloses possession of his personnel record. The personnel record admittedly embraces appellant's 17 years of service; yet the only information given out to the inquirer covered minutiae not asked for and of little or no interest to a prospective employer. The reply concludes with the

information (given gratuitously in 3 of the 4 causes of action) that appellee would not be prepared to consider appellant for re-engagement insofar as the writer could determine from appellant's records. None of the information given would reflect any reason for not wishing to re-engage appellant. The only inference to be drawn is that the records concerning appellant are not completely divulged and there is enough bad material in them to show a personnel specialist who has no "first hand" information that appellant would not be wanted back. The inquirer, assuming that Exhibit A [Tr. 15-18] is a genuine letter, would necessarily know that appellee's files contained at least the facts recited in Exhibit A bearing upon appellant's performance while in its employ. Yet as to his past duties appellee would not or felt it should not confirm any of his duties, not even that he had been Chief Engineer or that he had ever been employed by the I. G. E. family as an engineer. Appellee could not, or would not, make any comment concerning appellant's honesty, loyalty, competence, integrity or any of the other attributes specifically inquired about by the four prospective employers. Why did Mr. Pond's 17 years of continuous service not merit a statement that appellee's files showed nothing reflecting adversely upon him in any of those particulars? That is the very minimum that appellee could have said to avoid an inference harmful to appellant. Appellee's duty to make a forthright reply is greatly amplified by the knowledge that appellee had been authorized by I. G. E. to use Exhibit A. [Tr. 4; ¶ IV.] Nor was appellee content to allow matters to rest with mere ominous silence. The knock-out punch is delivered by adding to the already unfavorable tenor of the reply letter the statement that Mr.

Pond from his records would not be considered for re-engagement.

For what possible purpose could appellee have volunteered the statement as to appellant's undesirability for re-engagement while at the same time withholding all favorable data if not to deter him from obtaining the job he sought? By simple algebraic principles a minus with no plus to counterbalance it results in a minus. The giving of negative information with nothing good to offset it could evidence only a desire to convince the reader of the letter that appellee knew only unfavorable facts concerning appellant.

In the case of the fourth cause of action where Mr. Pond's eligibility for re-hiring was one of the matters of inquiry, the same result obtains. Appellee knew that it would answer that inquiry with a negative reply. Why then did it withhold everything good about Pond in its files unless it wished to have the inquirer believe that its files did not justify a favorable recommendation either generally or in the particulars directly inquired about?

Although when isolated the letter of reply was a cleverly conceived device for giving appellant a bad recommendation, the law does not permit the doing of an act indirectly that can not be done directly. *Quando aliquid prohibetur ex directo, prohibetur et per obliquum.* (*El Claro Oil & Gas Co. v. Daugherty*, 11 Cal. App. 2d 274, 281, 53 P. 2d 1028; *Estate of Keane*, 56 Cal. 407; *Woodward v. Brown*, 119 Cal. 283, 294, 51 Pac. 2.)

It was therefore error for the lower court to read the letter complained of by its four corners and to fail to consider the extrinsic facts as imparting an injurious meaning thereto.

IV.

The Letter Was Not Privileged.

Section 47, Subdivision 3, California Civil Code, does not confer privilege upon the communication herein.

Said code section provides: "In a communication, without malice, to a person interested therein, (1) by one who is also interested," etc.

By its very definition, the code section only applies to a communication without malice. The complaint expressly alleges malice. [Tr. 10, ¶ XV; 7, ¶ X.]

The Supreme Court of California holds that the privilege provided by the above code section is a conditional privilege which is destroyed by malice. (*Brewer v. Second Baptist Church*, 32 Cal. 2d 791, 197 P. 2d 713). In the same case the court's language indicates that the privilege is also lost where defendant has no reasonable grounds to believe that the statement made is true. [Tr. 9; ¶ XIII.] To the same effect see Restatement of the Law, Torts, Volume 3, Sections 600-601.

It was therefore error for the District Court to base any action in dismissing the complaint upon the above statute.

V.

Conclusion.

For the reasons hereinbefore given the judgment of dismissal should be reversed.

Respectfully submitted,

RUSSELL K. LAMBEAU,

Attorney for Appellant.

